15-265

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 166.

DAVID E. JAMES, APPELLANT,

vs.

MICAJAH McCORMACK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

FILED MARCH 8, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 166.

DAVID E. JAMES, APPELLANT,

vs.

MICAJAH McCORMACK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print
Petition of David E. James for review	2	1
Transcript of record from district court	15	4
Bill of complaint of M. McCormack	15	5
Answer of David E. James	29	8
Exhibit D (bill of complaint, case of McCormack vs. James et al.)	39	11
Receipt	44	12
Answer of Hansford James	44	12
Answer of David E. James	49	14
Exhibit A (deed, James to Ward)	54	15
Exhibit Y Y (answer of Holbrook, assignee, to bill of McCormack)	57	16
Exhibit O (decree of district court)	62	17
Exhibit D (decree of district court dissolving injunction)	64	18
Exhibit Z (agreement between James and McCormack)	69	19
Exhibit R (warrant to marshal)	71	20
Petition and schedules in bankruptcy of Hansford James	79 to 90	22
Order of removal	91	28
Acceptance of assignee	92	29
Assignment to assignee	93	29
Report of assignee	94	30
Certificate of register	95	30
Order	96	30
Amended bill of McCormack	98	31
Order	104	33
Separate answer of D. E. James	105	33
Exhibit A (deed, James to McCormack)	116	36
Exhibit X (deed, James et al. to Wilson)	120	37
Exhibit C (note)	126	38
Exhibit D (note)	127	39
Order	128	40

	Original.	Print.
Separate answer of Hansford James	131	40
Petition of D. E. James	140	42
Demurrer and answer of M. McCormack	153	45
Decree of district court	163	47
Appeal bond of James—appeal to United States circuit court	165	48
Order (copy of decree of district court)	167	48
Clerk's certificate	169	49
Order docketing case	170	49
Order granting injunction, &c	171	49
Final decree	174	50
Appeal bond of James	176	51
Certificate to transcript of record	180	52
Notice of appeal	181	52

1 United States circuit court, western district of Va.

Pleas before the honorable Hugh L. Bond, judge of the circuit court of the United States for the western district of Va., in the fourth circuit, at the court rooms thereof, in the city of Lynchburg, on the 23d day of March, 1877.

Be it remembered that heretofore, to wit, at a circuit court of the United States for the western district of Va., held at the court rooms thereof, in the city of Lynchburg, on Monday the 23d day of March, A. D. 1876, David E. James preferred his petition for a writ of supersedeas to two chancery decrees of the district court of the United States for the western district of Virginia, held at Abingdon, rendered respectively on the 12th day of June in the year 1875, and of Octo-
2 ber, in the year 1875, (June, 1875, and October, 1875), in a certain suit in equity depending therein on a bill of review, wherein Micajah McCormick was complainant and David E. James et al. defendants, with a transcript of the record of the proceedings of said court in said cause annexed to said petition.

The said petition and transcript of the record are in the words and figures following, to wit:

Petition.

In the United States circuit court, western district of Va., at Lynchburg.

To the Hon. Hugh L. Bond, judge.

The petition of David E. James, of Wythe County, Virginia, within said judicial district, would respectfully represent unto your honor that he is aggrieved by two final chancery decrees of the United States district court for the western district of Virginia, at Abingdon, Va.,
3 rendered respectively on the *on the* 12th June, 1875, and October, 1875, in a certain suit in equity depending therein on a bill of review, wherein one Micajah McCormick was complainant and David E. James, your petitioner et al., were defendants, and on the petition of said James for a rehearing of the decree of 12th of June, 1875, rendered on said bill of review. From a transcript of the record from the court below, herewith presented, marked X, it will be seen that the case is as follows: On the 2d November, 1874, said McCormick filed his bill of review in the United States district court at Abingdon, Va., against your petitioner, David E. James, et al., to review two decrees rendered on 24th November, 1866, and on June, 1870, by Hon. John C. Underwood, judge of the United States district court for the district of Virginia, at Richmond, Va., in an original bill in chancery brought in said last named court on 11th November, 1868, by said complainant as complainant vs. your petitioner and oth-
ers for the specific performance of a contract. The pretended equity
4 of said original bill was that on the 19th of May, 1863, one Hansford James, a cousin to petitioner and the brother-in-law to said McCormick, by a mere verbal contract sold him, said McCormick, the tract of land now here in controversy at the price of $7,500, of which $6,500 was paid in hand in confederate currency, and that for residue, $1,000.00, said McCormick executed his bond to said Hansford James, payable two years after the date thereof; that neither deed nor title bond were executed for same; that possession of said land was delivered

said McCormick by said Hansford James, and such possession continued until 1868 when, on 30th of May in that year, said Hansford James filing his petition in bankruptcy, the same land was sold under an order of said bankrupt court, being the United States district court at Richmond, Judge Underwood presiding, said sale being made by G. I. Holbrook, the assignee in bankruptcy of said Hansford James, and at said sale said land was purchased by said David E. James;
5 that David E. James was being placed in possession of said land by the marshal of the district, and the sa id McCormick, as ancillary to his original bill for specific performance of said verbal contract, prayed and obtained from said Judge Underwood an injuction to restrain said marshal, petitioner David E. James, and all others, from interference with said possession.

On part of petitioner, on 23d of February, 1866, he, petitioner, said Hansford James, bankrupt, and Holbrook, assignee in bankruptcy, each answered said bill, denying said McCormick's equity to a specific performance of said verbal contract, in so much as, on the 21st of April, 1861, over two years before the said verbal contract, the said Hansford James, being largely indebted to your petitioner, David E. James, had conveyed by a deed of trust to one James Ward, as trustee, the same land named in said bill for specific performance to secure petitioner and other creditors of said Hansford James; that in said deed of trust
6 petitioner was a preferred creditor; that his said debts had never been paid and said deed of trust never satisfied until said Hansford James, the grantor in said deed of trust, having on the 30th of May, 1869, gone into bankruptcy and surrendered said land as a part of his assets, with an enumeration of all liens, encumbrances, charges, and so *so* forth, the said land was sold by an order of the district court of the United States in said bankrupt case, by Holbrook, assignee thereof, at public vendue, and at said sale your petitioner, David E. James, became the purchaser of said land; sale reported to and confirmed by the court, and no exceptions endorsed or made by said McCormick thereto, nor any claim on his part to his said pretended verbal contract, although he was noticed as a creditor, and made a party to the record in bankruptcy; thereupon, a deed was made to said land to one Wilson, a purchaser from petitioner, David E. James, in which said assignee, Holbrook, Ward, trustee in the deed of trust, petitioner, and said Hansford James' wife, all united, said Hansford having already by the
7 *the* deed of trust divested himself of all legal title to the said land, and his equity of redemption having been condemned by the bankrupt sale.

Petitioner would now show that the same cause came on to be heard in the said United States district court at Richmond on the 24th of November, 1869, on said McCormick's original bill, answers of petitioner, Holbrook, assignee, and Hansford James, with exhibits filed, replication and argument of counsel, and the Hon. John C. Underwood did then and there dissolve the said McCormick's injunction, and by his decree ordered possession of the said land to be, and it was, delivered to petitioner, David E. James, by the marshal of said court, and on the 24th of June, 1870, no cause having been shown to reinstate the said dissolved injunction, the bill was dismissed at the costs of said McCormick; that again, at Abingdon, Va., on the 21st November, 1872, before the Hon. Alexander Rives as district judge, said McCormick sought by motion to reinstate his said dissolved injunction and dismissed bill, an-
8 other hearing of his case, but the said Hon. Alexander Rives himself in view of the former adjudications of the case by Judge Underwood, did refuse to reinstate the said bill, and again dismissed it

on its merits at said McCormick's cost. Thus it will be seen that the subject matter of this appeal has been solemnly adjudicated by two courts through the three decrees, those of 24th November, 1869, and 24th June, of 1870, in Richmond, and that of 21st of November, 1872, by Judge Rives, at Abingdon, Va., each and all adverse to the pretended equity of said McCormick.

It was these final decrees that said McCormick again sought to and did impeach collaterally by his decree of June, 1875, on his bill of review, on which process was made returnable to 1st of January, 1875, and by his said decree of October, 1875, which refused petitioner a rehearing of the decree of June term, 1875. In addition to his late bill of review he has since filed, at October term, 1875, his amended and sup-
9 plemental bill of review against your petitioner, David E. James, and others for still further relief in antagonism to former decrees named.

From these decrees of June and October, 1875, in the district court at Abingdon, and which reviewed, reversed, and annulled all former decrees of both judges, Underwood and Rives, himself, petitioner, David E. James, now appeals.

It is apparent that this is purely a chancery proceeding between David E. James, petitioner, and said McCormick, citizens of the same State and judicial district, in regard to a tract of land situate in said judicial district, and which each claims by adverse titles, while the bankruptcy of Hansford James is but an incident to the main controversy, and the bankrupt and his assignee being mere nominal parties, neither suing, nor from whom any substantial recovery is sought, the said bankrupt having received his final discharge without resistance, on the 12th March, 1869, and no proceedings having been instituted within
10 two years therefrom for its impeachment.

By way of assignment of errors, petitioner says:

1ST ERROR. The United States district court at Abingdon, on the bill of review, had no jurisdiction of either the persons or subject matter of this controversy, and hence said decrees of June and October, 1875, are "coram non judice," and must be reversed and annulled.

2D ERROR. The decrees of 24th November, 1869, and 24th June, 1870, of Hon. John C. Underwood, at Richmond, being final between same parties, and as to same subject matter, and unappealed from, were "res adjudicata," and hence not to be impeached by a court of co-ordinate jurisdiction, presided over by a different judge, as was the district court at Abingdon.

3D ERROR. Under statute of limitations it was qu'te too late
11 for the bill of review of 1st January, 1875, to review the decrees of November, 1869, and June, 1870, at Richmond.

4TH ERROR. After refusal of Judge Rives to reinstate appellees in McCormick's original bill, no new bill of review could be filed in the same court, the motion to reinstate and decree therein of November, 1872, being itself a review.

5TH ERROR. There was no proper ground for a bill of review in this case, as no new equity was set up, the latter being but a repetition of the former bill.

6TH ERROR. The bankrupt proceedings of Hansford James, in which there was a sale of the land in controversy to petitioner, sale confirmed, and to which proceedings McCormick was a party, was also conclusive against the said McCormick, and more than two years having expired from the final discharge of Hansford James, as also from the time

12 any cause of action (if any) accrued either for or against either assignee or the bankrupt.

7TH ERROR. The process issued from the bill was filed, and proceedings prosecuted in the district court at Abingdon, Va., but the decree of June term, 1875, was entered in the circuit court, without any order of removal thereto, and the order "nunc pro tunc" at October term, 1875, did not cure the error.

8TH ERROR. If the nunc pro tunc order of October term, 1875, was at all proper, petitioner should have had notice of its application.

ON MERITS.

9TH ERROR. Hansford James having by deed of trust of 31st April, 1861, parted with all his title to the land in controversy, the legal title to the trustee, Ward, and the equitable title to petitioner, David
13 E. James, the cestui que trust, he had nothing to sell to said McCormick at the date of his verbal purchase of said land, on the 19th May, 1863, except his equity of redemption, which had been forfeited by his default in paying the debts secured in the deed of trust, and it was, as it were, foreclosed by his bankruptcy proceedings.

10TH ERROR. The purchase by said McCormick from Hansford James, the grantor, with a full knowledge of the deed of April, 1861, which was a record in the clerk's office in the county of Smythe, where the lands are situate, was a fraud upon the rights of petitioner.

11TH ERROR. The court erred in ignoring the equities of J. J. M. Wilson, who is a subsequent purchaser of said land from petitioner, for value, without any notice of the latent and stale pretended equities of said McCormick; petitioner being bound to defend both the title and possession of his vendee, Wilson.

12TH ERROR. The court erred in the extent of relief granted
14 said McCormick; all the relief he was entitled to (if any) being the repayment to him by Hansford James alone of the scaled value of the trashy, depreciated $6,500 in Confederate States treasury notes paid by him in his own wrong to said Hansford James for land that he knew the said Hansford James had conveyed to petitioner's trustee more than two years before the said verbal contract of the 23d May, 1863: For these and other errors, to be urged at bar, petitioner prays for an appeal and supersedeas to said decrees of June and October, 1875, of the court below and that the same be reviewed, reversed, and annulled.

And as in duty bound, &c., he will ever pray, &c.

DAVID E. JAMES.

J. F. JOHNSON AND
CROCKETT & BLAIR,
Attorneys.

15 TRANSCRIPT OF RECORD.

To the Hon. Alexander Rives, judge of the district court of the United States for the western district of Virginia, at Abingdon.

Humbly complaining sheweth unto your honor your orator, Micajah McCormack, that heretofore, to wit, on the 11 November, 1868, your orator filed his bill before the Hon. John C. Underwood, the judge of the U. S. for the district of Virginia, against Hansford James, bankrupt, G. J. Holbrook, his assignee in bankruptcy, and David E. James, showing, among other things, that on the 19th day of May, 1863, your

orator had purchased from said bankrupt a parcel of land lying in Smythe Co., Va., at the price of $7.500, paying cash in hand $6,500 and executing his bonds to said bankrupt for $1,000.00, the balance,
16 payable two years after date. Possession of the land was under the said contract of bargain and sale delivered to your orator in the fall of that year and was held by him at the time of filing his said original bill, and had been so held and enjoyed by him, by your orator, from the fall of 1863 down to November, 1868, the time of filing said original bill.

Your orator further shows in his original bill that just before filing it he had for the first time learned that G. J. Holbrook, assignee of said bankrupt, had at the last preceding term of the county court of Wythe County sold said parcel of land as part of the estate surrendered by said bankrupt, and that one David E. James, the cousin of said bankrupt, became the purchaser at the price of $1.500.00.

Your orator further shows in his said original bill that he had
17 time and again offered to pay the balance of purchase due from him to said bankrupt, and that he was still ready and willing so to do upon receiving a deed for said land.

Your orator then asks that said Hansford James, bankrupt, G. J. Holbrook, assignee, and David E. James, purchaser, be required to answer his said bill; that all further proceedings under said sale be enjoined; that he be decreed a title for said land, and for general relief.

On the 9th of December, 1868, Hon. J. C. Underwood enjoined all further proceedings according to the prayer of the bill as appears by the order filed with the papers in the original suit.

On the 23d February, 1869, said bankrupt filed his answer, in which he expressly admits that he had sold the land to your orator as set out in the bill, and had put him in possession of it, and seeks to avoid
18 the consequences of his deliberate act of sale, and giving possession to your orator, and accepting cash $6,500 and bond for balance in full performance of contract on the part of your orator by averring that there was a deed of trust upon the land when he sold to your orator; that the sale was for confederate money and that the note for balance was not stamped; that the currency was worth less than when the note fell due, and that the contract of bargain and sale was not in writing, and therefore void; all of which allegations, as your orator is advised, are unavailing if true.

First. Admitting the existence of the deed of trust for the amount, still the said vendor had an equity of redemption which he could sell, and which he did sell to your orator, thereby divesting himself of all equitable title as he had by his deed of trust divested himself of
19 all legal title to said land.

Second. The fact that the transaction was for confederate money does not avoid it as there is no pretence of any inadequacy of price or fraud, and as he admits that he received $6,500 in confederate currency, worth then more than $1,100 in gold, for his equity of redemption in a tract of land worth only $1,500 in greenback', and burthened with an incumbrance of more than $2,000. In other words, if the proceedings in bankruptcy were fair and valid, he received $1,100 in gold for nothing.

Thirdly. The failure to stamp the note was the fault of said bankrupt, it fault at all, and did not in any event affect its validity.

Fourthly. The note was itself a sufficient memorandum in writing under the statute of frauds & perjuries. But, were it other-
20 wise, the receipt of the purchase-money showing that it was for land

(see receipt attached to original bill), the delivery of the possession and the admission by the vendor in his answer of the fact & terms of sale, not only answer 'lus place of said statute, but furnishes to the court all the knowledge and means necessary to enable it to compel a specific performance of the contract, so far as the vendor's rights were involved.

Lastly. His failure to surrender in his schedules in bankruptcy your orator's bond for $1,000 was a wrong, if not a fraud, upon his creditors and your orator.

Your orator would further show that on the 23d February, 1869, the said assignee, G. J. Holbrook, filed his answer, in which he denies all knowledge of the "statements and equities in the bill," claims to have done only his duty, and asserts that he had never heard of McCormack (your orator) until after the sale when James, the purchaser, ap-
21 plied to him to get possession from McCormack. He further asserts that David E. James, by his purchase at the price of $1,500, satisfied the deed of trust which was for a debt of $2,225, with interest from 26th April, 1861, besides other debts secured by said trust. How such a sale could satisfy such a trust your orator does not exactly see.

You orator would further show that he cannot understand how it is that the assignee did not know of his claim, and how it is that he had never heard of him until after the sale. It appears by the schedule of his property made out by the bankrupt that he mentions this land as conveyed in trust by deed executed to James Ward, trustee, on the 21st of April, 1861, and that said bankrupt had afterwards, in 1863, sold his equitable interest in said land to M. McCormack, your orator, for the sum of $7,500, who was placed in possession there-
22 of, and has continued to hold the same. It further appears from said schedule that said bankrupt names your orator as one of his creditors "for an unknown amount." And what this means your orator is somewhat at a loss to say; but it certainly gave the assignee information of your orator's existence and post office, and that he held an equity against said bankrupt, and was his creditor in the bankrupt's view of the case. When the assignee sold the land, then he had the means of knowing, and as your orator is advised he will in legal contemplation be held to know, of your orator's rights, and that the bankrupt having, some five years before he filed his petition in bankruptcy, parted with all his interest in said land, he, the assignee, could take no interest by the deed conveying to him all the estate of the bankrupt in
23 land to which said bankrupt had neither a legal nor an equitable interest a title, and that his sale of the land was wholly unauthorized, in utter disregard & violation of your orator's rights, and absolutely void.

Your orator would further show that on 23d February, 1869, David E. James filed his answer to your orator's bill, in which he alleges that he knew nothing of the sale by Hansford James to your orator. He admits that your orator was in possession of the land, as charged by plaintiff in his bill, and exercised ownership over it from the time he received possession from Hansford James, the vendor, in the fall of 1863, down to the institution of plaintiff's suit in Nov., 1868, a period of more than five years. He charges in his answer that your orator, when he purchased from Hansford James, had notice of the deed of trust in his favor, because the same was of record; and
24 he says that "inasmuch as the debt of $2,225 due him has never been discharged, he had a right to require the trustee to sell, and

inasmuch as Hansford James, the vendor, had gone into bankruptcy, his assignee had the right to sell," &c.

Your orator would show that since he filed his original bill, and since the decree of Judge Underwood dissolving the injunction, your orator and said David E. James entered into an agreement in writing, and which is now, as he is informed and believes, in the possession of James T. Porter, esq., of Smythe County, with whom it was deposited by the parties, submitting all matters in difference between them in said original suit to the final arbitrament and award of James H. Gilmore, esq., and A. P. Cole. That after said agreement to arbitrate had been thus entered into, your orator regarded the litigation in this honorable
25 court as ended, and made no further preparation of the case in court, but set about to prepare the case, on his part, to be heard and determined by said arbitrators, and that while the case was so pending before said arbitrators, the decree was pronounced in this court dismissing your orator's bill without bringing to the notice of your honor the fact that the case had, by agreement between the paties, been submitted to arbitration, and without the knowledge or consent of your orator.

Your orator would further show that when said arbitration agreement was made the said David E. James admitted to your orator that he knew that your orator had purchased the land from said Hansford James, as in your orator's bill is alleged. Then it was that your orator for the first time since the commencement of proceedings in bank-
26 ruptcy, had it in his power to establish a fact which said D E. James denies in his answer, to wit, that said James knew that—knew of your orator's purchase.

This fact your orators would have brought to the knowledge of your honor but for the aforementioned agreement to arbitrate. After the agreement to arbitrate, the said David E. James failed under various frivolous pretexts to proceed with the arbitration until the decree dismissing the bill was rendered, & then he refused to proceed with it.

Your orator would further show that he is informed and believes that the said David E. James had sold & assigned the bond for which the deed of trust was given to one Henry Home, on the day of Feb'y, 1862, and that he again became the owner of said bond on 1st May, 1867, as appears by written indorsements made on said bond, which is now on file in the original suit. This paper your orator never saw until since his bill was dismissed.

Your orator would further show unto your honor that by an order made in this cause on the 21 Nov., 1872, your orator's bill was dismissed at his costs.

27 Your orator is advised that for the reasons set out in his bill of review, the *the* decree of the 21st of Nov., 1872, above mentioned, as also the decree dissolving the injunction, is erroneous. Your orator is also advised that if there be no error in said decree, yet your honor will grant him a review of his case, because of the after discovered facts hereinbefore mentioned, which facts he *he* was not apprised that he could establish until, after he had entered into said agreement, he was prevented from bringing to the notice of your honor.

To the end therefore, that the said defendants, Hansford James, G. J. Holbrook, & David E. James, may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several corporal oaths, and according to the best & utmost of their several & respective knowledge, remembrance, information & belief, full, true, direct, and perfect answer make to the statements and allegations of this

bill as if they were here sep'rated, and they thereto distinctly &
28 severally interrogated, and that for the reasons and under the circumstances hereinbefore mentioned the said decree may be reviewed, reversed and annulled, & for nothing held, and that your orator may be restored to the possession of his land, and that he may have such further and other relief as his case may require and to equity seems meet, may the U. S writ of sp'a issue, &c., directed, &c., and your orator as in duty bound will ever pray, &c.

M. McCORMACK,
By Counsel.

CAMPBELL & TRIGG,
J. W. & J. P. SHEFFEY,
Sol's for Pet.

(Endorsements:) 1874, Oct. 28. Sworn to & filed this day. B. Gildersleeve, jr., clerk, U. S. D. C. W. D. of Va. Leave to file given & process directed, &c. Alex. Rives, judge. 2d Nov'r, '74.

29 VIRGINIA:

In the district court of the United States for the westrn district of Virginia.

To the Hon. Alexander Rives, judge of said court:

The separate answer of David E. James to a bill of review filed in this honorable court by Micajah McCormack, complainant ag'st respondents & als defendants.

This respondent, after reserving to himself the benefit of the usual exceptions to said bill of review, for answer thereto, or to so much thereof as he is advised it is material for him to answer, he answering says that it is true that compl't heretofore filed his original bill before the Hon. John C. Underwood, judge of the U. S. court for the district of Va., against Hansford James, bankrupt, & als. That for the statements therein made resp'd't begs leave to refer to the said bill itself as
30 Ex. G. Exhibit G; that Hon. John C. Underwood did grant the injunction according to the prayer of said original bill as is stated by compl't in his bill of review; that the said Hansford James did answer the said original bill, and for the matters and things therein stated by said Hansford this resp'd't begs leave again to refer to that answer as Exhibit "X"; that G. J. Holbrook, as assignee, and this resp'd't also answered said original bill, and for the respective statements made by the two last named resp'd'ts in their respective answers, this resp'd't here begs leave to refer to said answers respectively as "Y & Y." This respondent, answering further, says that upon the filing of these answers, the cause coming on to be heard before the Hon. John C. Underwood, judge, &c., upon the said original bill upon the several answers thereto, the said injunction which had heretofore been granted was dissolved, to wit, on the 24th day of November, 1869, as will at large
31 appear from an office copy of said order which is herewith exhibited, marked "O" as a part of this answer, and that it is also true that on the 21st day of November, 1872, the said original bill was dismissed at the costs of the compl't as per Exhibit "D."

This resp'd't, answering further the said c'oss bill of review, insists that there is no error in the decree dissolving the injunction granted as aforesaid, according to the prayer of the original bill; because, he says,

however valid and binding the contract of sale of the tract of land in said original bill mentioned might be as between Hansford James & compl't, yet the said compl't could only take such an interest in said tract of land as Hansford James then had, and the interest of the said Hansford James in the said land was only an equity of redemptions, for the said Hansford had previously sold and conveyed the said land to a trustee, in trust to secure this resp'd't in the sum of money
32 in the said deed of trust mentioned, to which said deed reference is hereby made as Exhibit "A," and that which said compl't purchased of the said Hansford was only this equity of redemption of said land. That said deed of trust was duly recorded in the clerk's office of the county court of Smythe County, in which county the said land lies, and that, too, before the said compl't had made his purchase or pretended purchase of the same land from the said Hansford. This being so, the said deed of trust was not only valid as to the several parties thereto, but was also valid and binding as to third persons. It may be true that when the said Hansford was adjudged a bankrupt on his own petition that he had parted with his whole title, both legal and equitable, to said land. But when the said Hansford went into bankruptcy, what did the bankrupt law require him to do both in reference to this resp'd't, who is the
33 party secured by the said deed of trust, and to the land in said deed mentioned? By the plain requirements of that law it was made the sworn duty of said Hansford James to surrender in the schedules of his creditors the name of each of his several creditors & the amounts that he respectively owed them, and to state further whether any of them were secured, & how secured. In discharge of this plain duty the said Hansford named in his said schedule the name of this resp'd't as one of his creditors, stating the amount which he owed him; that said debt was secured, & by the said deed of trust. Thus the debt due from said Hansford to this resp'd't passed into the jurisdiction of the bankrupt court, together with its security, which is the tract of land in said deed of trust mentioned. This resp't then had, it is most respectfully submitted, the right to have the bankrupt court to enforce the collection of his debt due from the said Hansford, & in enforcing the debt out of its security, it was competent for the bankrupt court to direct either G. J. Holbrook, the assignee of said Hansford, or the
34 trustee in said deed to sell the said land therein mentioned and described. The bankrupt court directed the assignee to sell, & at his sale this resp'd't became the purchaser at a price for much less than the sum mentioned in said deed as due to him. Therefore it is plain that when compl't purchased the equity of redemption of said land of said Hansford that he purchased nothing *nothing*, or rather that he purchased a mere right which has proven to be worthless. (See bank-
Ex. R. rupt proceedings marked R.) Therefore there is no error in the said decree dissolving said injunction. This resp'd't answering further says that the evidence which compl't says he has discovered since the rendition of the said two orders entered in said original suit, if true, is insufficient to reverse said two decrees or either of them. But this resp'd't denies that compl't alleges a single fact that was not fully known to him before his said original bill was dismissed with costs against compl't.

This resp'd't, however, admits that on the 4th day of November, 1870, he did agree with compl't to arbitrate all matters in dispute be-
35 tween them about the said land in the original bill mentioned,
Ex. Z. a copy of which said agreement is herewith exhibited, marked Z, as a part of this answer. This agreement was made under these circumstances. Compl't then knew & had known for some time before

that his said injunction had been dissolved. He thereupon represented to this resp'd't that he had then said injunction reinstated, but rather than litigate the matter further in court he would prefer to have the whole matter disposed of by arbitration. Resp'd't relying upon this statement thus made to him by compl't, he readily assented to the proposition to settle their matters in controversy by arbitration; at the same time your orator expressed to compl't his doubts about the truth of his statement, that he had had said injunction reinstated. Compl't insisted that such was the fact. The said arbitration agreement was then rendered to writing, and to meet the conflicting views of resp'd't & compl't as to the condition of their said suit at that time they recited in said agreement that they (compl't & resp'd't) "having on hand at suit the U. S. court at," &c., the word "having" being inserted to meet
36 compl't's view, & had to meet that of this resp'd't; unless this resp't had relied upon the statement of compl't that said injunction had been reinstated he never would have consented to arbitrate a matter that had already been decided in his favor by a court having jurisdiction of the matter. The said arbitration agreement was therefore obtained from this resp'd't through the false and fraudulent misstatement and misrepresentation of a fact that was at the time known to compl't to be false. This respondent denies that he by one pretext or another put off the arbitration, and though under the circumstances he would have been justified in doing so, a time and place was once fixed by the arbitrators in said agreement named for the arbitration, and notice thereof given to resp'd't & compl't, at which time & place resp'd't did attend with his witnesses for the purpose of having the case decided by the arbitrators, but compl't did not put in his appearance, and the
37 arbitration was then dropped. This was before resp'd't had certainly ascertained that the statement of compl't, that he had had said injunction reinstated, was false. This resp'd't denies that he, at the time of making said arbitration agreement, admitted to compl't that he knew that he made the purchase as alleged in said original bill, but did state that since compl't had filed his original bill that he had ascertained that he had purchased as stated in his bill. If compl't was relying on his arbitration agreement to resettle his case for him, it was his own fault that he did not bring the matter to the attention of the court before his bill was dismissed. He surely cannot complain of his own lashes. It may be true, as compl't states, that he never saw the bond secured by the said deed of trust until after his bill was dismissed, but this surely was no fault of this resp'd't; it was filed in the original suit that he might see it, and he could have done so *if* he had not neglected his case from the time he obtained his injunction until his bill was
38 dismissed. But he does not say, & cannot say truthfully, that he was ignorant of the assignment of said bond to Horne by this resp'd't, and of its subsequent reassignment to this resp'd't by Horne, because this resp'd't repurchased said bond from Horne by the advice & with the full knowledge of compl't.

This resp'd't would further show unto your honor, that in his view of the case that the decree sought to reviewed in this case, is the one of the date of Nov'r 1869, dissolving said injunction; & that the bill in this suit filed by compl't to review said decree was not filed in the time required by the statute of limitation, and upon this statute, to defeat the review sought by compl't, this resp'd't relies as if the same was since formally pleaded.

And now having answered every material and almost every imma-

terial allegation of compl't's bill, prays hence to be dismissed with his costs about this suit in this behalf expended, and as in duty bound, &c.

CROCKETT & BLAIR,
For Compl't.

VA., WYTHE COUNTY:

39 This came David E. James before me, B. E. Ward, a justice of said county, & made oath that the statements in the foregoing answer are true.

Given this 10th May, 1875.

B. E. WARD, *J. P.*

Filed this 24th day of May, 1875.

B. GILDERSLEEVE, JR., *C.*

Copy of Exhibit G, referred to above.

To the Hon. John C. Underwood, judge of the district court of the United States for the western district of Va.:

The bill of complaint of Macajah McCormack, a citizen of Washington County, Virginia, would most respectfully represent, That on the 19th day of May, 1863, your orator purchased from Hansford James, of Smyth County, Virginia, a tract of about two hundred and eighty-five acres of land, lying in the Rye Valley, in said county of Smyth, Virginia, for the sum of seven thousand five hundred dollars, of which your orator paid to the said Hansford James the sum of six thousand five hundred dollars, and executed his note to said James for one thou-

40 sand dollars, payable two years after date, and dated the 19th day of May, 1863, as your orator believes & states from memory. As evidenced of the payment of said sum of six thousand and five hundred dollars, your orator files herewith, as part of this bill, the receipt of said Hansford James to your orator, bearing date May 19, 1863, for sixty-five hundred dollars, payment on a tract of land lying in Rye Valley, Smyth County, Va., being for the tract of land aforesaid,

EX. NO. 1. which receipt is marked No. 1.

The said Hansford James, after making said contract of sale, and receiving said sum of six thousand five hundred dollars, and the note of your orator for one thousand dollars in full for said tract of land, put your orator into possession of said land in the fall of 1863, & your orator seeded the land that fall, and put a tenant on the land, and your orator has held full, peaceable, and undesturbed possession

41 of said land by himself from that time to the present. Your orator has occupied and enjoyed the land by cultivation, improvement, residence, & other open, notorious, and habitual acts of ownership, without interruption or claim known to your orator from said Hansford James. Your orator did not apprehend that the said James, who he understands is an applicant for the benefit of the act of bankruptcy, had surrendered, or would surrender any claim to said land, or any interest therein, much less that he would fraudulently attempt to surrender the land itself in the schedule of his effects. Your orator supposed when he recently heard of his application in the court of bankruptcy that he had surrendered, or would surrender your orator's note as part of his effects, notwithstanding your orator has always been ready and willing, & has offered to pay said James said note

42 upon making him a title for the land. To his great surprise your orator has just heard that Holbrook, assignee of the said James

that his said injunction had been dissolved. He thereupon represented to this resp'd't that he had then said injunction reinstated, but rather than litigate the matter further in court he would prefer to have the whole matter disposed of by arbitration. Resp'd't relying upon this statement thus made to him by compl't, he readily assented to the proposition to settle their matters in controversy by arbitration; at the same time your orator expressed to compl't his doubts about the truth of his statement, that he had had said injunction reinstated. Compl't insisted that such was the fact. The said arbitration agreement was then rendered to writing, and to meet the conflicting views of resp'd't & compl't as to the condition of their said suit at that time they recited in said agreement that they (compl't & resp'd't) "having on hand at suit the U. S. court at," &c., the word "having" being inserted to meet
36 compl't's view, & had to meet that of this resp'd't; unless this resp't had relied upon the statement of compl't that said injunction had been reinstated he never would have consented to arbitrate a matter that had already been decided in his favor by a court having jurisdiction of the matter. The said arbitration agreement was therefore obtained from this resp'd't through the false and fraudulent misstatement and misrepresentation of a fact that was at the time known to compl't to be false. This respondent denies that he by one pretext or another put off the arbitration, and though under the circumstances he would have been justified in doing so, a time and place was once fixed by the arbitrators in said agreement named for the arbitration, and notice thereof given to resp'd't & compl't, at which time & place resp'd't did attend with his witnesses for the purpose of having the case decided by the arbitrators, but compl't did not put in his appearance, and the
37 arbitration was then dropped. This was before resp'd't had certainly ascertained that the statement of compl't, that he had had said injunction reinstated, was false. This resp'd't denies that he, at the time of making said arbitration agreement, admitted to compl't that he knew that he made the purchase as alleged in said original bill, but did state that since compl't had filed his original bill that he had ascertained that he had purchased as stated in his bill. If compl't was relying on his arbitration agreement to resettle his case for him, it was his own fault that he did not bring the matter to the attention of the court before his bill was dismissed. He surely cannot complain of his own lashes. It may be true, as compl't states, that he never saw the bond secured by the said deed of trust until after his bill was dismissed, but this surely was no fault of this resp'd't; it was filed in the original suit that he might see it, and he could have done so if he had not neglected his case from the time he obtained his injunction until his bill was
38 dismissed. But he does not say, & cannot say truthfully, that he was ignorant of the assignment of said bond to Horne by this resp'd't, and of its subsequent reassignment to this resp'd't by Horne, because this resp'd't repurchased said bond from Horne by the advice & with the full knowledge of compl't.

This resp'd't would further show unto your honor, that in his view of the case that the decree sought to reviewed in this case, is the one of the date of Nov'r 1869, dissolving said injunction; & that the bill in this suit filed by compl't to review said decree was not filed in the time required by the statute of limitation, and upon this statute, to defeat the review sought by compl't, this resp'd't relies as if the same was since formally pleaded.

And now having answered every material and almost every imma-

terial allegation of compl't's bill, prays hence to be dismissed with his costs about this suit in this behalf expended, and as in duty bound, &c.

CROCKETT & BLAIR,
For Compl't.

VA., WYTHE COUNTY:

39 This came David E. James before me, B. E. Ward, a justice of said county, & made oath that the statements in the foregoing answer are true.

Given this 10th May, 1875.

B. E. WARD, *J. P.*

Filed this 24th day of May, 1875.

B. GILDERSLEEVE, JR., *C.*

Copy of Exhibit G, referred to above.

To the Hon. John C. Underwood, judge of the district court of the United States for the western district of Va.:

The bill of complaint of Macajah McCormack, a citizen of Washington County, Virginia, would most respectfully represent, That on the 19th day of May, 1863, your orator purchased from Hansford James, of Smyth County, Virginia, a tract of about two hundred and eighty-five acres of land, lying in the Rye Valley, in said county of Smyth, Virginia, for the sum of seven thousand five hundred dollars, of which your orator paid to the said Hansford James the sum of six thousand five hundred dollars, and executed his note to said James for one thou-

40 sand dollars, payable two years after date, and dated the 19th day of May, 1863, as your orator believes & states from memory. As evidence of the payment of said sum of six thousand and five hundred dollars, your orator files herewith, as part of this bill, the receipt of said Hansford James to your orator, bearing date May 19, 1863, for sixty-five hundred dollars, payment on a tract of land lying in Rye Valley, Smyth County, Va., being for the tract of land aforesaid,

EX. NO. 1. which receipt is marked No. 1.

The said Hansford James, after making said contract of sale, and receiving said sum of six thousand five hundred dollars, and the note of your orator for one thousand dollars in full for said tract of land, put your orator into possession of said land in the fall of 1863, & your orator seeded the land that fall, and put a tenant on the land, and your orator has held full, peaceable, and undesturbed possession

41 of said land by himself from that time to the present. Your orator has occupied and enjoyed the land by cultivation, improvement, residence, & other open, notorious, and habitual acts of ownership, without interruption or claim known to your orator from said Hansford James. Your orator did not apprehend that the said James, who he understands is an applicant for the benefit of the act of bankruptcy, had surrendered, or would surrender any claim to said land, or any interest therein, much less that he would fraudulently attempt to surrender the land itself in the schedule of his effects. Your orator supposed when he recently heard of his application in the court of bankruptcy that he had surrendered, or would surrender your orator's note as part of his effects, notwithstanding your orator has always been ready and willing, & has offered to pay said James said note

42 upon making him a title for the land. To his great surprise your orator has just heard that Holbrook, assignee of the said James

in bankruptcy, has, at the last term of the county court of Wythe, this week, sold said tract of land as a part of said James' effects, & that at the sale one David E. James became the purchaser at the price of fifteen hundred dollars. Your orator was wholly ignorant of said sale, and charges that the surrender was in fraud of the rights of your orator.

Your orator is willing, upon getting a title for said land, to pay the amount due upon his note; but he is willing to surrender said land, or to pay the balance due upon his purchase without a deed for the title, or a deed conveying a good, sufficient title. As your orator is without remedy in the premises at law, and is only relievable in equity, his prayer is that *that* the said Hansford James, Holbrook, assignee in bankruptcy of said Hansford James, and David E. James be made parties defendants to this bill, and answer the
43 same fully and truly on oath, that they be enjoined from all further proceedings upon the sale of said land under pretext of claim thereto by said Hansford or David E. James, until the matters of this bill can be heard and determined in equity; that upon a hearing they be perpetually enjoined and a title to said land decreed to your orator upon such terms as shall be equitable. And that such other and further relief be granted as to equity pertains and the case of your orator requires, may the United States writ of sp'a & inj. issue, directed, &c.

J. W. SHEFFEY &
JOHN W. JOHNSTON,
Counsel for Complainant.

VIRGINIA, *Washington County, to wit:*

This day Macajah McCormack made oath before me, a justice of the peace in and for said county, that the matters stated in the foregoing bill are true as he verily believes.

Given under my hand this 17 day of September, 1868.

JAMES C. GREENWAY, *J. P.*

44 Subscribed and sworn to before me this 28th day of October, 1868.

H. C. GIBBONS,
Register 8th Dist. Va.

Filed No. 11, 1868. E. J. Underwood, clerk U. S. dist. court, dist. of Va.

The following is a copy of the receipt referred to in the foregoing bill: "Rec'd of M. McCormack sixty-five hundred dollars, payment on a tract of land lying in Rye Va'ley, Smyth Co., Va.

HANSFORD JAMES.

MAY 19, 1863.

Ex. X.

To the hon'l John C. Underwood, judge of the United States district court for the district of Virginia.

The separate answer of Hansford James to a bill exhibited in this hon'l court by Macajah McCormack, compl't, against your respondent as bankrupt by G. J. Holbrook, his assignee, & David E. James,
45 def'ts, would respectfully show your respondent did at the time mentioned in said bill sell to the said McCormack the tract of

land so far as he had any interest therein at the time, and that the terms of the said contract of sale are substantially as alleged in said bill, but your respondent denies the allegation that your respondent perpetrated any fraud upon said McCormack in said sale, as he communicated to said McCormack at the time of the said sale the fact of the lien of David E. James by deed of trust. And your respondent would further aver that after the conveyance of the said tract of land to one James Ward, as trustee for the benefit of David E. James and others, that the said tract continued in the possession of your respondent the period of said sale to said *said* McCormack, at or about which time your respondent gave possession to said McCormack. Your respondent would further ask that said portion of the answer David E. James as refers
to the said deed of trust, certificate of recordation, and the date of
46 said sale to the said McCormack be made a part of this respondent's answer. Your respondent avers that the said sale to Micajah McCormack took place on the 19th May, 1863, more than two years after the deed of trust to James Ward, for the benefit of David E. James, by your respondent. Your respondent further avers that the said McCormack paid your respondent $6,500 in Confederate currency, and executed his note for $1 payable two years after date thereof, which was dated 19th May, 1863; which said $1,000 was also for the said Confederate currency, and your respondent would aver that the said note for $1,000 did not fall due until the said money of the Confederate States was worthless, whereby the consideration thereof wholly failed to your respondent. And your respondent would further shew that the said note for $1,000 was not stamped at the time of its execution, as required by the internal revenue laws of the United States, nor has the stamp
been put thereto since that time & the penalty remitted. And
47 your respondent would further say, that the said contract for the said land between your respondent & the compl't, McCormack, was not in writing signed by the parties to be bound thereby, & therefore void under the statute of fraud & perjury. And your respondent further alleges that he executed said sale of said land to said compl't with the hope and expectation that your respondent would be able to satisfy the debts due to said David E. James & others from your respondent, and for the securing of which to the said parties the said deed of trust was made, but in this your respondent was wholly disappointed, insomuch as the said parties, & all others to whom your respondent was indebted, refused to receive the said Confederate money, altho' your respondent made a tender thereof to all of his said creditors. And your respondent further says that he did not surrender the said note for
$1,000, executed by compl't to your respondent, in his schedule
48 in bankruptcy, because he was advised that the said note, by the late decisions of our courts, is wholly depreciated and worthless; and, besides, that as it was not stamped, and as the time allowed by the act of Congress for stamping written instruments had long since passed, the said note was not legal evidence of any debt, and could not be collected by your respondent's assignee; but your respondent would say that if the compl't desires your respondent so to do, that he will amend his schedule as the said act of Congress provides, and will surrender the same for the benefit of his creditors; but your respondent refuses, and insists that he shall not relinquish his right to the said land in the event of his surrender of the said note of $1,000.00.

The prayer, therefore, of your respondent is, that the said bill

of complaint may be dismissed as to him, and that he may recover his reasonable costs.

HANSFORD JAMES,
Per CROCKETT & BLAIR,
Attorneys.

Subscribed and sworn to before me this 17th day of Feb., 1869.
C. E. GOODRICK,
U. S. Commissioner.

Filed Feb. 23, 1869. Ed. J. Underwood.

To the Hon. John C. Underwood, judge of the district court of the United States for the district of Virginia.

The separate answer of David E. James, one of the def'ts to a bill exhibited in the said court by Micajah McCormick, comp'l't, against Hansford James, G. J. Holbrook, and David E. James, would respectfully represent that he knows nothing about the sale of land made by Hansford James to comp'l't, McCormick; but it is true as stated by comp'l't in his bill that the said McCormack has been in actual, absolute possession and has exercised ownership since the period named in the said bill; that it is not true as stated in said bill that the said McCormack purchased the said land without any notice of a lien subsisting thereon, but your respondent avers that on the 25th day of April, 1861, the said Hansford James being indebted to your respondent in the sum of $2,225.00, due by note of same date payable one day after date, he, the said Hansford James, executed to James Ward, as trustee, a deed of trust by which he conveyed to the said trustee in trust for the payment of the said debt of $2,225.00 the said tract of land mentioned in the compl't's bill, which said deed of trust was admitted to record on the 25th of April, 1861, in the clerk's office of the county court of Smythe, State of Virginia, which said deed of trust by an office copy thereon, with the certificate of said recordation, is herewith filed, marked "A," and prayed to be taken as a part of respondent's answer.

Your respondent would further say that he knows the fact that the said Hansford James has gone into bankruptcy, and that he, the said Hansford, believing that he had an interest in the said tract of land in the bill mentioned to the extent of the unpaid purchase-money due from the said McCormick, and also an equity of redemption as to the deed of trust as to the David E. James, did surrender the said tract of land for the benefit of his creditors, as he had a legal right to do, and as he was bound to do by the provisions of the said bankrupt act.

And your respondent would further aver that when the said tract of land was put up at public outcry at the court-house of Wythe County on the day of Nov., 1868, he, the said David E. James, did, as a creditor standing on his express lien created by the said deed of trust, bid for the same, and that it was cried off to your respondent at the sum of $1,500.

Your respondent is advised that inasmuch as the debt of $2,225 due your respondent as mentioned in the aforesaid deed has never been discharged he has a right to require the said James Ward, trustee in said deed, to . the same in the manner specified in said deed; and further that inasmuch as the said Hansford James has taken the benefit of the bankrupt law the same land might be sold either by said trustee or the said G. J. Holbrook, assignee of the said Hans-

ford James, and that the sale of the said Holbrook, as assignee as aforesaid, was legal and valid in every particular. Your respondent would further say that the said Micajah McCormack's allegation is without foundation when he says that he was an innocent purchaser without notice, since by the law in such cases made and provided the said deed of trust was notice to the world from the time of its said recordation in the said clerk's office of Smyth County wherein the said land is situate. The prayer of your respondent is, therefore, that the said bill be dismissed as to him, and that he recover his reasonable costs in and about this writ expended.

DAVID E. JAMES,
Per his att'ys, CROCKETT & BLAIR.

54 Subscribed and sworn to before me this 17th day of February, 1869.

C. E. GOODRICK,
U. S. Commissioner.

Filed February 23, 1869. Ed. J. Underwood.

The following is a copy of Exhibit A, referred to in the foregoing answer of David E. James:

Ex. A.

This deed, made and entered into this 25th day of April, 1861, between Hansford James of the one part and James Ward of the other part, witnesseth:

That the said Hansford James do grant unto the said James Ward a certain tract of land, with all its appertenances, lying in the Rye Valley, Smythe County, Va., known as the Ezelvire James farm, and on which the said Hansford James now resides, in trust to secure the fol-
55 lowing debts: First to secure David E. James in a bond of twenty-two hundred and twenty-six dollars the 25 day of April, 1861, payable to said David E. James, and due at one day; also to secure the same in the payment of three notes executed by said Hansford James to the said David E. James, one for $100, one for 105, and the other for $122.50 *cents*, and assigned by said David E. James to Peter B. Snipp; also to secure Williams James, sr., in the payment of a note of three hundred and seventy-five dollars, dated the 25th day of April, 1861, due at one day; and, lastly, I hereby secure all the remainder of my creditors jointly, whether due by note or account. And it is the agreement between the parties that should the said Hansford James pay the above described debts on or before the 25th day of April next, then this
56 deed is to be void; otherwise the trustee is to make sale of the land on a reasonable time's notice and pay over the proceeds as they law directs. Witness my hand and seal this the 25th day of April, 1861.

The word April interlined before signing.

HANSFORD JAMES. [SEAL.]
JAMES WARD. [SEAL.]

VIRGINIA, *to wit, Smyth County, to wit*:

This is to certify that Hansford James whoes name appears signed to the within deed, came this day before me, Robert C. Williams, acting justice for said county, and acknowledged the same to be his act and deed and desired me to certify the same to the clerk of the county court

of said county that it may be duly recorded. Given under my hand and seal this 25 day of April, 1861.

R. C. WILLIAMS, *J. P.*

57 VIRGINIA:

In the clerk's office of Smyth County court, April 25, 1861.

The within deed of trust from Hansford James to James Ward, trustee, bearing date on the 25th day of April, 1861, was presented in the office aforesaid, the above date acknowledged by said James Ward as his act and deed, and with the certificate of acknowledgement of Hansford James, annexed, admitted to record.

Teste:

W. C. SEXTON, *Clk.*

Copied from the record. Teste:

W. C. SEXTON, *Clk.*

Fee for copy, 75c.

EXHIBIT Y Y.

In the district court of the United States for the western district of Virginia.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT. } In bankruptcy.

58 The answer of G. J. Holbrook, as assignee of the above named bankrupt, to a bill of complaint exhibited against him as such assignee, together with other parties defendants, by Micajah McCormack, in the district court aforesaid.

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto saith that he disclaims all knowledge of any of the statements and equities set forth in the said complainant's bill; that he, this defendant, being an entire stranger and third party to any transaction which may have taken place between the said bankrupt and the said complainant prior to settlement of the estate of said bankrupt by this defendant as his assignee, and this defendant, acting in *in* the capacity of such assignee under the act of Congress
59 establishing a uniform system of bankruptcy, approved March 2, 1867, has done nothing contrary to the provisions of said act prescribing and fixing the duties of assignee in the settlement of the estate of the bankrupt. And this defendant, further answering, saith that he never heard of such a man as the complainant in said bill until after he had made sale of the real estate mentioned in the bill, when he was called on by the purchaser, D. E. James, to apply for an order from this honorable court to compel the complainant, Micajah McCormack, to deliver possession of said estate to him, the said D. E. James, purchaser aforesaid; and this defendant, further answering, saith that, knowing nothing of the complaint in said bill, and having nothing before him but a copy of the schedule under hand of the register, setting forth
60 the surrender of all the estate, both real and personal, of said bankrupt, he, this defendant, discharged his duty as assignee by making sale of the real estate mentioned in said copy of schedule and

doing all and everything in the premises necessary to the discharge of his duty as such assignee, and to making a full and complete settlement of the estate and effects of the said bankrupt; and this defendant further saith and quotes this language of the surrender of said bankrupt, as will fully appear to the court by reference to the said copy of the schedule marked A of the bankrupt, to wit:

"Interest in land."

280 acres of land in Smythe Co., Va., value not given.
Deed of trust to James Ward.

The above surrender and a true copy of the deed of trust to
61 James Ward, under hand of clerk of Smythe county, Va., is all that this defendant had before him in the settlement of the said bankrupt's estate; and he further saith that upon proper proceedings he sold at public auction, on the 14th day of September, 1868, the 280 acres of land mentioned in said surrender, and that David E. James became the purchaser for the sum of $1,500, thereby satisfying the deed of trust in which he, the said D. E. James, was the beneficiary, and that this defendant has made report of his proceedings in settlement of said *said* estate; and this defendant further saith that the note complainant for one thousand dollars, balance of purchase money so mentioned in the bill, was not and is not surrendered upon the schedule of the bankrupt, and concerning which this defendant knows nothing.
62 And now, having fully answered the complainant's bill, this respondent prays to be hence dismissed with his reasonable costs in this behalf expended, and he will ever pray, &c.

G. J. HOLBROOK, *C. C.*

VIRGINIA,
Wythe County, to wit:

This day personally appeared before me G. J. Holbrook, and being duly sworn, stated that the statements contained in the foregoing answer are true to the best of his knowledge and belief.

C. E. GOODRICK,
U. S. Commissioner.

This 6th day of February, 1869.
Filed Feb. 23, 1869. Ed. J. Underwood, dist. cl'k.

EXHIBIT O.

In the district court of the United States for the district of Virginia.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT. } In bankruptcy.

63 SMYTH COUNTY:

At Richmond, in said district, on the 24th day of June, 1870, before the honorable judge of the said district court, in bankruptcy, district of Virginia, to wit:

Upon consideration of the bill filed in this case by Micajah McCormack, and the answers thereto, and the exhibits filed (the injunction awarded) upon filing said bill, having been dissolved by an order entered herein on the 24th day of November, 1869, the court doth adjudge, order, and decree that David E. James, the purchaser of the real estate

surrendered by said bankrupt and sold by G. J. Holbrook, assignee, is entitled to the possession of said real estate, and doth now order
64 that the marshal of this district do, without delay, proceed to put the said David E. James in full possession of the said real estate, and for that purpose is authorized and directed to dispossess and eject therefrom any person holding possession thereof against the claim of the said purchaser.

Nov. 21, 1870.

JOHN C. UNDERWOOD,
District Judge.

Filed Nov. 21, 1870. E. J. Underwood, dist. clerk.

EXHIBIT D.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT. } In bankruptcy.

At Richmond, in said district, on the 24th day of November, 1869. Before the honorable judge of said district court in bankruptcy.

DISTRICT OF VIRGINIA, *ss:*

It is ordered that the injunction heretofore, to wit, on the 9th
65 day of December granted, restraining G. J. Holbrook, assignee of said bankrupt, and all other persons, from selling or in any way interfering with any of the property of the said Hansford James, the said bankrupt, be dissolved.

Witness the Hon. John C. Underwood, judge of the said court, and the seal thereof, at Richmond, on the 24th day of December, 1869.

ED. J. UNDERWOOD,
Clk Dist. Court.

(Endorsed:) Filed Nov. 24, 1869. E. J. Underwood, dist. cl'k.

In the district court of the United States for the district of Virginia.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT. } In bankruptcy.

SMYTH COUNTY.

66 At Richmond, in said district, on the 24th day of June, 1870, before the honorable judge of the said court, in bankruptcy, district of Virginia, to wit:

Upon consideration of the bill filed in this case by Micajah McCormack, and the answer thereto and the exhibits filed (the injunction awarded upon filing said bill having been dissolved by an order entered herein on the 24th day of November, 1869), the court doth adjudge, order, and decree that David E. James, the purchaser of the real estate surrendered by said bankrupt and sold by G. J. Holbrook, assignee, is entitled to the possession of said real estate, and doth now order that the marshal of this district do proceed without delay to put the
67 said David E. James in full possession of the said real estate, and for that purpose is authorized and directed to dispossess and eject therefrom any person holding possession thereof against the claim of the said purchaser.

JOHN C. UNDERWOOD,
District Judge.

NOV. 21, 1870.

(Endorsed:) Order of possession. Filed Nov. 21, 1870. E. J. Underwood, dist. clerk.

MICAJAH MCCORMACK,
v.
HANSFORD JAMES.

The papers in this cause having been placed in the hands of this court, upon a motion to reinstate the injunction and for a hearing, and the court being of opinion that no cause is shewn for reinstating the
68 injunction, declines to reinstate it; and thereupon the cause came on finally to be heard upon the bill, answer, and exhibits, and the court having considered the same, it is adjudged, ordered, and decreed that the bill be dismissed with costs to the defendants.

ALEXANDER RIVES,
Dist. Judge.

NOVEMBER 21, 1872.

(Endorsed:) Filed 21 November, 1872. E. T. Watson, cl'k.

And at another day, to wit, at a district court of the United States continued and held for the western district of Virginia on Monday, the 2d day of November, 1874.

M. MCCORMACK, PETITIONER,
against
HANSFORD JAMES & OTHERS, DEFENDANTS.

69 On motion of the plaintiff leave is given him to file his bill of review, and it is done. On consideration whereof the clerk is directed to issue process summoning the defendants in said bill mentioned to appear and answer said bill; and the cause is continued.

Copy of Exhibit Z, with answer of D. E. James.

These presents witnesseth that whereas D. E. James & M. McCormack having or had a suit in the U. S. court at Richmond in regard to a certain tract of land in Rye Valley, Va., and said D. E. James claiming said land and damages for rents and profits to be collected off of said McCormack, and said McCormack claiming said land, and it is agreed that James H. Gilmore and A. P. Coleman are to take the
70 claims of both parties into consideration and settle said matter according to law. In the event the said Gilmore and Cole' can't agree they are to take a third man.

In witness whereof we hereunto set our hands and seals and bind ourselves in the sum of five thousand dollars, to stand to their decision, this the 4th of November, 1870.

D. E. JAMES.
M. MCCORMACK.

VIRGINIA, *Smyth Co., to wit:*

I do hereby certify that J. T. Porter personally appeared before me, Samuel Wilkinson, a justice of Smyth County, and made oath that the above writing bearing date November 4, 1870, is a true copy of the instrument of *of* writing placed in his hands for safe-keeping by D. E. James & M. McCormack, on the 4th day of November, 1870.

71 Given under my hand and seal this the 6th day of April, 1875.

SAMUEL WILKINSON, *J. P.*

EXHIBIT R.

Warrant to marshal as messenger.—Voluntary bankrubtcy.

In the district court of the United States for the district of Virginia.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT. } In b'k'tcy.

By whom a petition for adjudication in bankruptcy was filed on the 30th day of May, 1868.

DISTRICT OF VIRGINIA, *ss:*

To the U. S. marshal of said district, greeting:

Whereas a petition for adjudication in bankruptcy, and for re-
72 lief under the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, was on the 30th day of May, 1868, filed by Hansford James, of Rural Retreat, in the county of Wythe, in said district, upon which he has been found and adjudged bankrupt, there being no opposing party thereto, you are therefore directed, as messenger to be published two times in the State Journal, published at Alexandria, Virginia (the first publication to be made forthwith), the following notice, to wit: This is to give notice that on the 9th day of June, 1868, a warrant of bankruptcy was issued out of the district court of the United States for the district of Virginia against the estate of Hansford James, of Rural Retreat, in the county of Wythe, in said
73 district, who has been adjudged a bankrupt on his own petition. That the payment of any debts and the delivery of any property belonging to said bankrupt, to him, or for his use, and the transfer of any property by him are forbidden by law; and that a meeting of the creditors of said bankrupt to prove their debts, and to choose one or more assignees of his estate, will be held at a court of bankruptcy to be holden at the register's office in Abingdon, before H. C. Gibbons, esq., register in bankruptcy for said district, on the 1st day of July, A. D. 1868, at 1 o'clock p. m.

And you are further directed to serve a written or printed notice forthwith, either by mail or personally, on all creditors of Hansford James whose names appear on the schedule filed with his petition, or
74 whose names may be given *given* you in addition thereto by the debtor at least ten days before the day of meeting of creditors appointed by the court, in the following form, to wit:

To M. of in the county of and State of creditor of Hansford James, bankrupt:

SIR: You are hereby notified that a warrant in bankruptcy has just been issued out of the district court of the United States for the district of Virginia, against the estate of Hansford James, in the county of Wythe in said district, who has been adjudged a bankrupt upon his own petition. That the payment of any debts and the delivery of any property belonging to said bankrupt to him or for his use, the transfer of any property by him, are forbidden by law. That a meeting of the creditors of said bankrupt, to wit:

75 Creditors.	Residence.	Am't of Debt
David E. James,	Rural Retreat	2,225 00
Fayette McMullan,	Marion	Unknown.
Berry St. John,	"	240 00
M. P. Watson,	"	7 50
P. B. Snapp,	Glade Spring	340 00
C. N. Hoffman,	Big Meadow	Unknown.
David Jones,	Rye Valley	200 00
W. L. Midd'e,	Rural Retreat	100 00
Wm. Scott's Ex'or,	Rye Valley	115 50
Party unknown,	unknown	30 00
Edwin Sanders,	Marion	75 00
David Copenhave,	Marion	35 00
R. K. Williams, admr',	Rye Valley	Unknown.
James Bell, Ex'or,	Lead Mines	Unknown.
Richard ,	Rye Valley	200 00
M. McCormack,	Glade Spring	Unknown.
Clark & Burroughs,	Rural Retreat	10 00
Mark Wright,	Big Lick	2 50

76 to prove their debts and choose one or more assignees of Hansford James, will be held at a court of bankruptcy to be holden on the 1st day of July, A. D. 1868, at one o'clock, p. m., at the register's office in Abingdon, before H. C. Gibbons, esquire, register in bankruptcy of said district. And have you then there this warrant with your doings thereon.

Witness the Hon. John C. Underwood, judge of the said district court, and the seal thereof, at Richmond, in said district, on the 9th day of June, A. D. 1868.

EDWARD J. UNDERWOOD,
Clerk said Dis't C't.

Return of marshal.

DISTRICT OF VIRGINIA, *ss:*

By virtue of the foregoing warrant, I have caused the notice therein ordered to be published by advertisement, two times in the news-
77 papers therein mentioned. The first public notice thereof was on the 20th day of June, A. D. 1868, in the State Journal; and also on the 21st day of June, A. D. 1868, sent by mail or served personally upon the creditors named in said warrant a copy of the notice required thereby to be sent to or served on them. And all of said notices were according to directions set out in said warrant.

Fees and expenses: 1. Service of warrant, $2.00; 2, necessary travel at the rate of five cents a mile each way; 3, notice to creditors, 19 @ 10 c., 1.90; 4, actual expenses in publishing notices as follows, .75; 5, postage & envelopes,. 67—$5.32.

78 M. J. GOODRICK,
Deputy Marshal.

Affidavit to expenses.

UNITED STATES OF AMERICA,
District of Virginia, ss:

On this 1st day of July, A. D. 1868, personally appeared the said M. J. Goodrick, messenger, and made oath that the above expenses returned

by him under numbers 1, 3, 4, 5 have been actually incurred and paid by him, and are just and reasonable.

H. C. GIBBONS,
Register.

Filed Aug. 17, 1869. Edward J. Underwood, clerk said dis't c't.

79 [U. S. bankruptcy act, March 2, 1867, sec. 11.]

Petition by debtor.

To the Hon. John C. Underwood, judge of the district court of the United States for the district of Virginia:

The petition of Hansford James, of the P. O. of Rural Retreat, in the county of Wythe, State of Virginia, and district aforesaid, respectfully represents, that he has resided for six months next immediately preceding the filing of this petition at Rural Retreat, within said judicial district; that he owes debts exceeding the amount of three hundred dollars, and is unable to pay all of the same in full; that he is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, as amended by the acts of June 8, 1872, and March 3, 1873.

That the schedule hereto annexed marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed marked B, and verified by your petitioner's oath, contains an accurate inventory of all his estate, both real and personal, assignable under the provisions of said act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said act, and that he may be decreed to have a certificate of discharge from all his debts provable under the same.

HANSFORD JAMES.

CROCKETT & BLAIR, *Attorneys.*

Oath.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

I, Hansford James, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according the best of my knowledge, information, and belief; and I do further swear that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

HANSFORD JAMES, *Petitioner.*

Subscribed and sworn to before me this 30th day of May, 1868.

C. E. GOODRICH,
U. S. Commissioner for Dist. of Virginia.

80 *Oath to Schedule A, as approved.*

UNITED STATES OF AMERICA,
District of Virginia, ss:

On the 30 day of May, A. D. 1868, before me personally came Hansford James, the person mentioned in and who subscribed to the foregoing petition, and to the schedule marked A, thereto annexed, and who being by me first duly sworn did declare the said schedule to be a statement of all his debts, &c., in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 18 .

C. E. GOODRICH,
U. S. Commissioner for Dist. of Virginia.

81 [Page 80.] [U. S. bankrupt act, March 2, 1867.—Secs. 11, 36, 39, 43.]

SCHEDULE A.—3.

Creditors whose claims are unsecured.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT.

N. B. The dates of the bills or notes, and when due, with the names, residences, and business, or occupation of the makers or drawers, and acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to petitioner should be stated, and his business and place of residence. Same particulars as to notes on which petitioner is liable as endorser.

Reference to ledger or voucher.	Names of creditors.	Place of residence and occupation.	When and where contracted.	Amount. Dollars.	Amount. Cts.	Nature of liability, whether same was contracted as copartner joint contractor, or with any other person; and, if so, with whom.
	Rich'd Kirk..	Rye Valley, farmer.	1861, Smythe Co.	200	00	Judg't for 2 horses with Jno. James as surety.
	M. McCormack.	Glade Spring, farmer.	1865, Washington Co.	Unknown.		Note for horse executed to John Williams.
	Clark & Burroughs.	Rural Retreat, merchants.	1866, Wythe Co	10	00	Account for goods.
	Mark Wright.	Big Lick, merchant.	1-65, Montgomery.	2	50	Note for goods.

HANSFORD JAMES.

82 [Page 81.] [U. S. bankrupt act, March 2, 1867.—Secs. 11, 36, 39, 43.]

SCHEDULE A.—2.

Creditors holding securities.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT.

N. B. Particulars of securities held, with dates of same, and when given, are to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the 11th section of the act, and whether contracted as copartner or joint contractor with any other person; and, if so, with whom.

Ref'ce to ledger or voucher.	Names of creditors.	Residence and occupation.	When and where contracted.	Value of securities.		Amount of debts.		Particulars.
				Dollars.	Cts.	Dollars.	Cts.	
	David E. James	Rural Retreat, farmer.	1861, Wythe County.	4,000	00	2,225	00	Deed of trust executed on real estate, 21st April, 1861, & of record in the clerk's office of the county c't of Smyth.
	Fayette McMullan.	Marion, Va., politician.	1860, Smythe County.	4,000	00	Unknown.		Same deed.
	Berry St. John	Marion, Va., farmer.	1859, Smyth County.	4,000	00	240	00	Same deed.
	N. P. Watson	Marion, Va., physician.	1866, Smyth County.	4,000	00	7	50	Same deed.
	P. B. Snapp	Glade Spring, Va., merchant.	1859, Washington County.	4,000	00	340	00	Same deed.
	C. H. Hoffman	Big Meador, physician.	1860, Grayson Co.	4,000	00	Unknown.		Same deed.
	David James	Rye Valley, farmer.	1859, Smyth Co.	4,000	00	200	00	Same deed.
	Wm. L. Huddle	Rural Retreat, farmer.	1859, Wyth Co.	4,000	00	100	00	Same deed.
	Wm. Scott'sex'or	Rye Valley, farmer.	1859, Smyth Co.	4,000	00	150	00	Same deed.
	Party unknown.	Unknown, unknown.	1860, Smyth Co.	4,000	00	30	00	Same deed.
	Edwin Sanders	Marion, farmer.	1858, Smyth Co.	4,000	00	75	00	Same deed.
	David Copenhaver.	Marion, farmer.	1859, Smyth Co.	4,000	00	35	00	Same deed.
	R. K. Williams, adm'r.	Rye Valley, farmer.	1859, Smyth Co.	4,000	00	Unknown.		Same deed.
	James Bells, exo'r	Lead mines, manager.	1858, Wythe Co.	4,000	00	Unknown.		Same deed.

N. B. David E. James is secured first in the above deed over all others, & the rest to share equally after him.

This debt is also secured by a judgment rendered in the county court of Smyth prior to execution of deed of trust.

HANSFORD JAMES.

SCHEDULE B.—1.—(*Inventory.*)

Interest in lands.

IN THE MATTER OF
HANSFORD JAMES, BANKRUPT.

Statement of all real and personal estate and effects whatever, which are now in the possession, enjoyment, or under the control of the petitioner, or which are held by any other person in trust, for his use, or to the possession or enjoyment of which he is entitled at the date of filing petition.

Particular description of all real estate owned by petitioner, or held by him, and whether under contract or lease.	Encumbrances thereon, if any, and dates thereof.	Statement of all particulars relating thereto.	Estimated value.	
			Dollars.	Cts.
April, 1861, petitioner owned 280 acres of land in Smyth County, Va., and being indebted conveyed the same, in trust, to Jas. Ward, to hold as a security of his creditors, preferring first David E. James above the rest of his creditors, as set forth in Schedule "A 2." The said land is described in said deed by metes & bounds.	This deed was executed on 21st April, 1861, and is of record in the clerk's office of Smyth County county court, Jas. Ward the trustee in said deed resides at the P. O. of Rye Valley, Smyth County, Va. There was a judgment lien on said land before the execution of deed, in favor of Jas. Bell for $1,100, most of which has been paid.	The petitioner sold his equitable interest in said land to M. McCormack in 1863, for the sum of $7,500.00, and said McCormack was placed in possession thereof, who has continued to hold the same. There was no written agreement between them.		

HANSFORD JAMES.

84 [U. S. bankruptcy act, March 2, 1867, secs. 11, 36, 39, 43.]

SCHEDULE B.—2.—(*Inventory.*)

Personal property, except choses in action.

IN THE MATTER OF
HANSFORD JAMES, BANKRUPT.

A.

	Dollars.	Cts.
5 beds, $75; 1 bureau, $12; 3 tables, $6	$93	00
8 chairs, $4; 1 set knives & forks, $1	5	00
1 set tea cups and saucers, 50c.		50
1 set plates, $2; 1 pot, $1; 1 oven, $1	4	00
1 kettle, $2	2	00
1 suit of clothes (worn)	10	00
Clothes for wife and (7) seven children	25	00

E.

Books, prints, & pictures, few miscellaneous books	2	00

F.

Horses, sheep, cows, and other animals; 4 cows, $60; 1 yoke oxen, $60	120	00
15 sheep, $15; 8 hogs, $8	23	00

H.

Farming stock and implements of husbandry, 1 plow, $2; 2 axes, $1; 3 hoes, $1 ..... 4 00

85 [U. S. bankrupt act, March 2, 1867, secs. 11, 36, 39, 43.]

SCHEDULE B.—3.—(*Inventory.*)

Choses in action.

IN THE MATTER OF }
HANSFORD JAMES, BANKRUPT. }

A.—DEBTS DUE PETITIONER ON OPEN ACCOUNT.

	Dollars. Cts.
Z. W. Riddick, note 17th March, 1862	100 00
Wm. A. Cannon, note 15th November, 1855	800 00
John R. Monnee, note (as per John H. Gray's receipt)	200 00
James H. Bagley, note 4th Jan., 1860	60 00
S. S. S. H. T. Ingram, note 24th Jan., 1861	100 00
S. S. S. H. T. Ingram, note 4th Jan., 1861	5 00

83 [U. S. bankrupt act, March 2, 1867, secs. 11, 36, 39, 43.]

SCHEDULE B.—5.—(*Inventory.*)

IN THE MATTER OF }
, BANKRUPT. }

A particular statement of the property claimed as excepted from the operation of said act by the provisions of the 14th section thereof, as amended by the acts of June 8, 1872, and March 3, 1873, giving each item of property and its valuation, and if any portion of it is real estate, its location, description, and present use.

A.—Property claimed to be exempted, and which may be set apart by the assignee under the 14th section of the act of March 2, 1867, as amended by the acts of June 8, 1872, and March 3, 1873.

	Valuation. Dollars. Cents.
One bed, $15; 1 bureau, $12; 2 tables, $4	31 00
2 chairs, $1; books, $2; 3 cows, $25; 15 sheep, $15	43 00
8 hogs	8 00
	82 00
The residue of the $500.00 allowed the petitioner claims out of the proceeds of the notes surrendered by him, making	418 00
	500 00

Property claimed to be exempted by State laws, its valuation, whether real or personal estate, its description and present use, and under what State law exemption is claimed. See Code of Va. 1860, sec. 33, 34, 49th ch.

4 beds, 9 in family, $60; tables, $2; chairs, $3	65 00
1 set knives & forks, $1; cups & saucers (6), 50c	1 50
1 pot, $1; 1 oven, $1; 1 kettle, $2	4 00
1 cow, $35; 1 yoke oxen, $60	95 00
1 axe, 50c.; plow, $2; 1 hoe, 50c	3 00
6 plates, $2	2 00

87 [U. S. bankrupt act March 2, 1867, sec. 11.]

[Page 86.]

Oath to Schedule B.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

On this 30 day of May, A. D. 1868, before me personally came Hansford James, the person mentioned in, and who subscribed to, the foregoing petition and to the schedule marked B, respectively, and who, being by me first duly sworn, did declare the said schedule, as composed of sheets of paper, respect*fully* indicated thus, "Schedule B," to be a true statement of all his estate, both real and personal, in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and the acts amendatory thereof.

E. E. GOODRICK,
U. S. Commissioner for Dist. of Va.

88 (Endorsed:) Docket. Case No. . Page . Form No. .
[Page 87.] District court of the United States, western district of Virginia. In bankruptcy. In the matter of Hansford James, of Wythe County, Va., petitioning debtor. Petition by debtor and schedules thereunder. Crockett & Blair (P. O. address), attorney' for petitioner. Filed in the office of the clerk of the U. S. district court for the western district of Virginia this 9 day of June, A. D. 1868, at 9 o'clock a. m. Ed. J. Underwood, clerk. Printed at the job office of the "Lynchburg Evening Press," No. 200 Main street, Lynchburg, Va.

89 United States district court, western district of Virginia.
[Page 88.]

Whereas Hansford James, of the county of Smyth, and State of Virginia, and district aforesaid, has been duly adjudged a bankrupt, under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf.

It is therefore ordered by the court that said Hansford James is forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the 9th day of June, A. D. 1868, on which the petition for adjudication was filed by him; excepting such debts, if any, as are excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at Richmond, in said district, this 17th day of May, A. D. 1869.

_____,
District Judge.

MEMO.—See docket in bankruptcy, page .

90 *Docket in bankruptcy.*

IN THE MATTER OF HANSFORD JAMES, VOLUNTARY BANKRUPT. } Case No. 2478.

Crockett & Blair, att'ys; H. C. Gibbons, reg.; , ass'ee

1868.		
9 a. m. June 9.	Petition & schedules	Filed.
" "	Order reference iss	"
Dec. 1.	Memo. cert. pro iss	"
" " "	adj'n bankruptcy	"

"	"	"	warrant iss	"
"	"	"	" ret. ex	"
"	"	"	iss. 1st meet'g	"
"	"	"	appt'd ass'ee	"
"	"	"	not. "	"
"	"	"	accept "	"
"	"	"	proof claim	"
"	"	"	exempt by ass'ee	"
Nov.	11.	Pet. ris. ord		"
Dec.	9.	Rest. or iss		"
"	21.	Memo. ret.; ass'ee no assets		"
"	26.	Rest. ret'd executed		"
"	31.	Memo. pet. fin. dis		"
"	"	"	or show cause	"
"	"	"	2d & 3d meet'gs	"
1869.				
Feb'y	12.	"	meet'g show cause	"
"	"	"	2d & 3d meetings	"
"	23.	"	final oath	"
"	"	Ans.	Holbrooke, ass'ee	"
"	"	Ans.	D. E. James	"
"	"	Ans.	H. James	"
Mar.	8.	Memo. cert. pub'n		"
May	17.	Assignment		"
"	"	Cert. pub., 3d not		
1869.				
May	17.	Final oath		Filed.
May	17.	Abstract		"
"	"	Cert. register		"
"	"	" final discharge issued		"
Aug.	17.	Final papers received &		"
Nov.	24.	Or'd dissolv., rest. ord. iss		
1870.				
"	21.	Writ possession issued		"
1872.				
Ap'l	3.	Or'd ent'd removal to w. dist. at Abingdon		
	5.	Original papers sent " "		

A true copy. Teste:

ED. J. UNDERWOOD.

91 In the United States district court for the eastern district of Virginia.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT. } In bankruptcy.

On motion of the bankrupt, by E. S. Watson, his attorney, it is ordered by the court that the above-entitled cause be transferred to the western district of Virginia, at Abingdon, on the payment of the proper costs.

Richmond, April 3d, 1872.

JOHN C. UNDERWOOD,
Dist. Judge.

A true copy. Teste. From the court record.

E. D. UNDERWOOD,
District Clerk.

At a district court of the United States, continued & held for the western district of Virginia, at Abingdon, on 29th May, 1872.

In the matter of Hansford James, bankrupt, & of Micajah McCormack, v. David E. James, &c., connected therewith.

This cause having been removed from the district court of the United States at Richmond to this court, it is ordered that said matter
92 in bankruptcy & said cause of M. McCormack vs. David E. James, &c., be & the same are placed upon the docket of this court.

The following is a copy of the assignee's acceptance.
Dated at Wytheville, the 13th day of July, A. D. 1868.

To whom it may concern:

Be it known that I hereby signify my acceptance of the trust of assignee of the estate of Hansford James, of Rural Retreat, in the county of Wythe, and State of Virginia, bankrupt, notice of my appointment to which was on the 11th day of July, 1868, received by me.

G. J. HOLBROOKE,
Assignee.

(Endorsed:) Filed Aug. 17, 1869. Ed. J. Underwood, dist. clerk.

93 [Page 92.]

The following is a copy of the assignment of the bankrupt's effects to the assignees.

In the district court of the United States for the district of Virginia.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT. } In bankruptcy.

DISTRICT OF VIRGINIA, *ss:*

Know all men by these presents, that G. J. Holbrook, of the town of Wytheville, in the county of Wythe, and State of Virginia, has been duly appointed assignee in said matter.

Now, therefore, I, H. C. Gibbons, register in bankruptcy, by virtue of the authority vested in me by the fourteenth section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said G. J. Holbrooke, assignee as aforesaid, all the estate, real and personal, of the said Hansford James, bankrupt, including all property, of whatever kind, of which he is possessed, or in which he was interested, or entitled to have, on the 30th day of May, A. D. 1868, together with all his deeds, books and papers relating thereto, saving and excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act, to have and to hold all the foregoing premises to the said G. J. Holbrook, and to his heirs forever; in trust, nevertheless, for the use and purposes, and with the powers, and subject to the conditions and limitations prescribed and set forth in said act.

In witness whereof I, H. C. Gibbons, register in bankruptcy, have

hereunto set my hand at the city of Abingdon, Virginia, on the 13th day of July, 1868.

H. C. GIBBONS,
Register in Bankruptcy.

(Endorsed:) Filed May 17, 1869. Ed. J. Underwood, dist. clerk.

94 In the United States district court for the western of Virginia.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT. } In bankruptcy.

At Wytheville, in said district, on the 3d day of December, 1868.

DISTRICT OF VIRGINIA, *ss:*

On the day aforesaid before me comes G. J. Holbrook, of Wytheville, in the county of Wythe, and State of Virginia, and makes oath and says that he, this deponent, as assignee of the estate and effects of the above-named bankrupt, has never received or paid any money for or on account of said estate; further says that 280 acres of land in Smyth County, Va., encumbered by deeds of trust was sold by him, and D. E. James, the senior encumbrancer, became purchaser for
95 $1,500 being no surplus over his lien; also states the choses in action as worthless.

G. J. HOLBROOKE,
Assignee.

Subscribed and sworn to before me, at Wytheville, this 3d day of December, 1868.

H. C. GIBBONS,
Register.

(Endorsed:) Filed Aug. 17, 1869. Ed. J. Underwood, dist. clerk.

Certificate by register.

In the district court of the U. S. for the dist. of Virginia.

IN THE MATTER OF HANSFORD JAMES, BANKRUPT. } In bankruptcy.

The register, in terms of Rule XXI of the rules, orders, and regulations of this court, certifies that he has examined the proceedings in this case and finds them in all respects in conformity with the requirement of the act, and that no cause has been shown why the said bankrupt should not be discharged.

96 H. C. GIBBONS,
Register in Bankruptcy.

ABINGDON, VA., *March 12th*, 1869.

(Endorsed:) Filed May 17, 1869. Ed. J. Underwood, clerk.

At a circuit court of the United States, continued and held for the western district of Virginia, at Abingdon, on Saturday, the 12th day of June, 1875.

M. McCORMACK, PETITIONER,
v.
DAVID E. JAMES ET ALS., DEFENDANTS.

This cause came on this day to be heard upon the bill of review of the pet., the answers of the defendants and general replication thereto, the exhibits filed, and the papers of the original cause, and was argued by counsel. On consideration whereof the order of this court made on
21 Nov., 1872, is reversed, annulled, and it is further ordered that
97 the injunction heretofore awarded & dissolved is hereby reinstated, and it appearing to the court that the bankrupt, Hansford James, had long prior to the filing of his petition in bankruptcy parted with the legal title & his equity of redemption to the land in pl't's bill mentioned, the court is of opinion that no title, either legal or equitable, to said land passed to the assignee of the bankrupt by the deed of assignment in bankruptcy. It is, therefore, further ordered that the sale heretofore made of said land by said assignee be set aside, vacated, annulled, and that the pl't. have a writ of possession therefore. And it appearing to the court that there is a lien asserted against said land by David E. James, which he claims is prior in date to pl't's purchase, and that the lien is still subsisting & valid, and it further appearing that there is still a balance of purchase money due from the pl't., and that he claims to be entitled to rents & profits for the use of said land
98 during the time that he has been dispos'ed thereof, it is further ordered that he so amend his bill as to bring these matters any *any* others as he may be advised before this court, and this cause is continued.

To the Hon. Alex. Rives, judge of the district court of the United States for the western district of Virginia, at Abingdon.

Humbly complaining sheweth unto your honor your orator, Micajah McCormack, by way of amendment and supplemental to his original & bill of review filed in this cause.

That, as appears by said bills, he on the 19th day of May, 1863, purchased from Hansford James, since adjudicated a bankrupt, a parcel of land lying in Smyth County, Va., at the price of $7,500, paying cash in hand $6,500, the balance due two years after date. It appears by the papers in the cause that your orator was, in the fall of 1863, put into possession of said land by said bankrupt, and continued to use
99 and occupy it until he was dispos'ed and ejected, pursuant to an order made in the cause by Hon. Jno. C. Underwood, on the 24th day of June, 1870. Your orator was thus held out of possession until possession was restored to him on the 5th day of July, 1875, pursuant to an order entered in this cause by your honor on the 12th day of June, 1875.

Your orator claims that he is entitled to reasonable rents for his property, with interest from the end of each current year which he was kept out of possession.

Your orator would further show that defendant, David E. James, claiming, as appears by the papers in the cause, to be the owner by purchase at the sale of G. J. Holbrooke, assignee in bankruptcy of the effects of Hansford James, bankrupt, was put into possession of your orator's said land, and continued to occupy & use it either in person or by his tenants, receiving the rents, issues, and profits, until possession was restored to your orator on the 5th of July last.

100 Your orator is advised that he is entitled to receive from said

David E. James rents & profits or reasonable rents for his land, with interest annually, as above shown, for the period during which his property was occupied by said David E. James, as aforesaid. Your orator would further show unto your honor that said David E. James claims a lien upon said land by virtue of a deed of trust executed by Hansford James to James Ward, on 25th of April, 1861, to secure a debt to said David E. James. Your orator does not dispute his liability for any sum which may be justly due and owing on said deed of trust, but he does not admit that all or any part of said debt is due and owing.

He is informed that if the original transaction was fair & bona fide, which he does not admit, yet the consideration stated so much in excess of the true consideration, and he so charges the fact to be, and he asks that the said David E. & Hansford James may be required to an
101 swer & show what was the true consideration, whether or not it was for valid & fair and bona fide what has been paid upon it, and what if any part of it is still due and unpaid.

Your orator would further show unto your honor that whatever may be the effect of the recordation of said trust, as between your orator as a subsequent purchaser and the creditors of said Hansford James, yet he is advised and so insists that the conduct of David E. James has deprived him of claiming to be regarded as an innocent creditor holding a prior security of which your orator had & must be treated as having notice.

The said David E. James was cognizant of Hansford James' effort to sell to your orator, and actually advised James to sell and your orator to buy, but never intimated to your orator that the deed of trust existed, of which fact your orator was entirely ignorant. Your orator did not reside in Smyth County, where the lies and where the
102 trust was recorded. Having no occasion to look into the condition of Hansford James, he was aware of it. Hansford & D. E. James are cousins, and Hansford & your orator are brothers-in-law; when, therefore, they approached your orator with proposals for him to purchase the land, good faith required that they should disclose all the facts with reference to it. This they utterly failed to do, but on the contrary they induced your orator, uninformed as he was, to make the purchase and to pay nearly the entire price to Hansford James without disclosing the existence of the trust now claimed by David E. James.

Your orator insists that to the extent of the payment thus made by him to Hansford James, with, as it was, the knowledge and consent of said David, that David is estopped to set up and assert his claim against your orator.

Your orator would further show that there is still due of the purchase money the sum of $1,000, with its interest according to the face
103 of the bond. This sum he asks to decreed to be paid to David E. James in discharge of his claim by deed of trust; that is, so much of it, if anything, as may be found due after crediting your orator with the rents & profits or reasonable rents due from David E. James.

In tender consideration whereof and for as much as your orator is remediless at common law and only relievable in equity where matters of this sort are properly cognizable, to the end, therefore, that said David E. James, Hansford James & G. J. Holbrook, assignee of Hansford James, bankrupt, may be made defendant to this amended & supplemental bill, and that they may, separately, upon their corporal oaths, full, true, direct, and perfect answers make to all and singular the allegations hereof, as if they were here severally repeated and they hereto

separately interrogated, and that an account may be directed to ascertain the rents & profits or a reasonable rent for said land,
104 for the perid it was so used and occupied by said David E. James as above shown, and that your orator may have such further, other, and general relief as to equity belongs, and to your honor seems meet, may the U. S. writ of sp'a issue, &c., directed, &c.; and your orator, as in duty bound, will ever pray, &c.

M. McCORMACK,
By his Counsel.

CAMPBELL & TRIGG,
Sol's for Plaintiff:

(Endorsed:) Filed October 1, 1875, and process issued. B. Gilder-sleeve, clerk.

And at another day to wit, at a district court of the United States, continued and held for the western district of Virginia, at Abingdon, on Wednesday, the 3d day of November, 1875.

DAVID E. JAMES
v.
M. McCORMACK & OTHERS.

The answers of David E. James and Hansford James to the amended and supplemental bills of the defendants, with leave of the court were this day filed, and this cause is continued.

105 The following is a copy of the answer of David E. James and Hansford James, referred to in the above order.

In the United States district court for the western district of Virginia, at Abingdon, Va.

To the Hon. Alex. Rives, judge.

The seperate answer of D. E. James to a bill filed by way of amendment and supplement to an original bill, and a bill of review filed in this honorable court against him and others by one Micajah McCormack after demurring to said bill for want of equity upon its face, if any other further answer should be required, respondent answering, says that this is the third suit with which respondent has been vexed by said McCormack in regard to the subject-matter of his amended and supplemental bill. Respondent hereby enters his denial of all the allegations of this new bill, except so far as may be herein expressly admitted.

He says it is true, as stated, that said McCormack purchased from said Hansford James the tract of land situate in Smyth Co. re-
106 ferred to on 19th May, 1863, by a mere verbal contract, at the price of $7,500.00 in Confederate currency, of which $6,500.00 was paid in hand & for the balance of $1,000.00 a bond at two years by said McCormack to said Hansford, and it is fu'ther true that said McCormack took possession of said land either at or soon after his said purchase and remained in possession for several years. But it is further true that same land had been previously thereto, to wit, on 25th of April, 1861, conveyed in trust by said Hansford James to one James Ward as trustee to secure respondent in the payment of $2,225.00 evidenced by a bond dated 25 April, 1861, payable to respondent from

said Hansford one day after date, and also to secure respondent in the sum of $327.50, the am'ts of three notes executed by said Hansford to respondent, one for $105.00, and the other for $122.00, and which were assigned by respondent to Philip B. Snapp, together with other creditors in said deed of trust named, reference to which is Exhibit "A." here made as Exhibit "A," & it is prayed to be made a part
107 of this answer. Said deed of trust was properly acknowledged and was admitted to record in the clerk's office of the county court of Smyth on 25th April, 1861, indexed in the manner prescribed by law, and was so at date of the verbal trade of McCormack with said Hansford. Respondent further says that on 30th May, 1868, said Hansford filed his Schedule "A." No. 2. petition in the U. S. dist. court for bankruptcy, and Schedule "A," No. 2; respondent was reported as a creditor holding securities on his lands to the value of $4,000.00, by virtue of said deed of trust. Said Hansford in his schedules surrendered said land & reported its exact status in regard to both the trust deed & McCormack trade, and in his said case there was an order of sale of his said land by his assignee, G. J. Holbrook, at which sale respondent became purchaser. Said sale was reported and confirmed and a final discharge awarded said Hansford on 12th M'c'h, 1869. That on 4th Dec., 1871, respondent having sold same land to J. J. M. Wilson, the said Hansford &
108 wife, G. J. Holbrook, assignee in bankruptcy, James Ward, trustee in the deed of trust, & your respondent united in a deed of Exhibit "X." conveyance to said Wilson, as will be seen from Exhibit "X," who was placed in possession & has paid respondent purchase money. Thereupon said McCormack filed his bill of injunction before the hon. Jno. C. Underwood at Richmond, praying to restrain respondent from taking possession of said land, & to restrain assignee from all further proceeding under his sale aforesaid. But on 24th Nov., 1869, his honor Judge Underwood dissolved said injunction of McCormack, upon motion of your respondent, and on 21 Nov., 1870, the same judge made a final order in said cause, directing the marshal to place respondent in possession of his land, which was done at or about Nov., 1870, and respondent has remained in possession by himself & tenants & vendee since, till he was dispossessed under order of 12 June, 1875, in the bill of review of McCormack vs. respondent et al. On 21 Nov., 1872, said McCormack moved your honor to reinstate his said dissolved injunc-
109 tion, but your honor refused so to do & did, in fact, dismiss it at McCormack's costs, and matters thus stood on 13th June, 1875, when said McCormack brought his bill of review in which there was an order on 12th June, 1875. Respondent denies that said McCormack under these circumstances should be decreed any rents & profits of said land from Nov., 1870, to July 5, 1875, he being placed in possession by order of a court of competent jurisdiction, and under his purchase at the assignee's sale. But if it should be held that respondent should pay any such rents and profits, then respondent desires to offset them by his account of improvements that he has placed on said land. For since his purchase from assignee & his possession of said land, he has build a good barn on it; sowed it in grass, had much ditching & draining of the land, reset & repaired the fences, cleaned it of rocks, and by other acts of improvement & renovation has enhanced its value $1,000.00 more
110 than when he got it. This respondent is advised will be offset against any supposed rents and profits. Further answering he says that the said deed of trust of April 25th, 1861, from Hansford James to James Ward, trustee, was executed to him in good faith and for full and valuable consideration. Your respondent paid off for said

Hansford James large, and loaned him large, sums of money, among others the following, which compose the consideration of said trust deed. Respondent held a note of $779.00 on said Hansford for horses; he paid one S. P. James for said Hansford, $70.00; he paid James Ward for said Hansford, $67.11; he paid $1,141.22 to deputy sheriff of Smythe County on account of a fi. fa. of James O. Bell vs. Hansford James for which he holds receipt; he furnished said Hansford with cash amounting to several hundred dollars; and particularly
111 as the rest of the consideration did respondent pay him $167.00 or $168.00; he also paid one Copenhaver about $200.00 for said said Hansford. Respondent had a store account against said Hansford also, but the amount is not now remembered. Respondent and said Hansford had large transactions in trading horses and other things, and on 25th April, 1861, he being largely indebted to respondent, executed the said deed of trust in good faith to your respondent, who acted equally good faith. The said deed was fair, for a full and valid consideration, and is all of it still due and unpaid. Respondent not only insists on the 2,226.00 with interest from 25 April, 1861, as a charge and cumbrance on said land, but he also insists on payment of the three
112 notes of Hansford James to respondent, assigned to Philip B. Snapp of $100.00, $105.00 and $122.50 with interest, as will appear from Exhibit B. C. D., which are secured to respondent in said deed of trust equally with said $2,225.00, as respondent brought suit for the benefit of Philip B. Snapp on them, and being unable to collect them from said Hansford, said Snapp brought suit on said judgments by way of recourse on respondent, as assignee, and your respondent was forced and did pay them to said Snapp.

And further answering, respondent in most explicit manner denies that he ever advised or persuaded said M. McCormack to buy said trust land in May, 1863; there was no such advice after respondent's deed of trust was made; if there was ever before that, it would have
113 been a stupid act on respondent's part to persuade McCormack to buy for a depreciated currency, worth $600 only to $100 as per scale, lands upon which he had liens attached as early as 25th April, 1861, before there was any such thing as a depreciation of currency.

Respondent had a superabundance of Confederate money all the while and would not have accepted it from McCormack had he offered to remove the lien at any time after or at the date of his purchase. The fact is, respondent, at date of McCormack's purchase, did not control the debt of $2,225.00 named in deed, but had assigned the debt to one Henry Home; and it was afterwards reassigned by said Home to respondent, as will be seen from endorsements on the note itself.
114 And yet, said McCormack in his recklessness of assertion states that respondent was advising his purchase, which is wholly and utterly false. Respondent denies the alleged ignorance of McCormack said trust, but avers that he had full knowledge of its existence, and made his purchase with such full knowledge. Respondent never advised him to buy, indeed did not know of his purchase until afterwards, but said McCormack knew of respondent's trust as well as anybody could, as they had frequently spoke of it, and respondent always claimed its full payment. So respondent's conduct has not deprived him of claiming to be regarded as an innocent creditor, &c., as he knew nothing of the purchase, never advised it after his deed of trust, and in fact would not have advised it, as he would thereby consenting to
115 receive his sound currency debt in an inflated, worthless, trashy currency, and there can be no doubt, and so charges, that said

McCormack was fully cognizant of the lien in deed of trust, and by a cunning for which he is much celebrated where known, he tried to perpetrate a fraud on respondent by buying lands from Hansford James that he knew said Hansford had conveyed as far back as April 25, 1861, to respondent's trustee. And now having fully answered said bill he prays to be hence dismissed with his costs.

And as in duty bound, &c.,

D. E. JAMES.

CROCKETT & BLAIR, *P. D.*

VIRGINIA,
Wythe County, to wit:

I, C. B. Thomas, a notary public in and for the said county,
116 do certify that D. E. James, whose answer is written above, this day made oath before me that the statements made in said answer are true so far as made from knowledge and information derived from others. Given under my hand this 21 day of October, 1875.

C. B. THOMAS,
N. Public.

(Endorsed:) Filed this 3d November, 1875. B. Gildersleeve, dist. clerk.

The following is a copy of Exhibit A, referred to in the foregoing answer:

This deed made and entered into this the 25th day of April, 1861, between Hansford James of the one part, and James Ward of the other part, witnesseth that the said Hansford James do grant
117 unto the said Ward a certain tract of land with all its appertenances, lying in the Rye Valley, Smythe County, Va., known as the Ezekiel James farm, and on which the said Hansford James now resides, in trust to secure the following debts: First, to secure David E. James in a bond of twenty-two hundred and twenty-five dollars, dated the 25th day of April, payable to said David E. James, and due at one day, to secure the same in the payment of three notes executed by said Hansford James to the said David E. James, one for $100.00, one for $105.00, and the other for $122.50 *cents*, and assigned by said David E. James to Peter B. Snapp, also to secure William James, sr., in the payment of a note of three hundred and seventy-five dollars, datedt he 25th day of April,
118 1861, due at one day, and lastly, I hereby secure all the remainder of my creditors jointly, whether due by note or on account, and it is the agreement between the parties that should the said Hansford James pay the above described debts on or before the 25th day of April next, then this deed is to be void; otherwise the trustee is to make sale of the same on a reasonable time's notice, and pay over the proceeds as the law directs. Witness my hand and seal this the 25th day of April.

HANSFORD JAMES. [SEAL.]
JAMES WARD. [SEAL.]

The word April interlined before signing.

SMYTHE COUNTY,
Virginia, to wit:

This is to certify that Hansford James, whos' name appears signed to the within deed, came this day personally before me, Robert C. Will-
119 iams, acting justice for said county, and acknowledged the same

to be his act and deed, and desired me to certify the same to the clerk of the county court of said county, that it may be duly recorded. Given under my hand and seal this the 25th day of April, 1861.

R. C. WILLIAMS, *J. P.*

VIRGINIA:

In the clerk's office of Smythe County court, April 25, 1861.

The within deed of trust from Hansford James to James Ward, trustee, bearing date on the 25th day of April, 1861, was presented in the office aforesaid, the above date acknowledged by said James Ward as his act and deed, and with the certificate of acknowledgment of Hansford James, annexed, admitted to record.

Teste: W. C. SEXTON, *C.*

Endorsements.

120 The above assignment is this day made void and is of no effect by contract made by the undersign' this the first day of May, 1867.

HENRY HOME.
D. E. JAMES.

25th April acknowledged by James Ward and admitted to record.
Test': W. C. SEXTON.
Filed Nov. 24, 1869.

E. J. UNDERWOOD,
District Clk.

The following is a copy of Exhibit X, referred to in the foregoing answer:

This deed made this the 4th of December, 1871, between Hansford James and Mary M, his wife; G. J. Holbrook, as assignee in bankruptcy of said Hansford James; James Ward, as trustee (in a deed of trust heretofore executed by said Hansford James), and David
121 E. James, parties of the first part, and J. J. M. Wilson, of the second part, witnesseth, that for and in consideration of the sum of $4,000.00 to be paid as expressed in bonds bearing date by the party of the 2d part to of the first part, the said parties of the first part doth hereby grant, bargain, sell, and convey, with covenants of special warranty, except the said David E. James, who conveys with covenants of general warranty, unto the party of the second part, all their right, title, and interest in and to a tract of about 200 acres of land, more or less, the same being all the land sold to said Hansford James by James M. Scott, except that portion sold by said James to Jenkins Williams, lying and being on both sides of the fork of Holston River, in Smythe Co., Va., adjoining the
122 lands of James Ward, John James, et al. to have and to hold, &c. Witness the following signatures and seals.

[SEAL.]
MARY M. JAMES. [SEAL.]
G. J. HOLBROOK, [SEAL.]
Ass'ee in b'k'tcy of H. James.
JAMES WARD, *Trustee.* [SEAL.]

VIRGINIA, *Wythe Co., to wit:*

This day came G. J. Holbrook, whose name is signed to writing

above dated on 4 December, 1861, personally before and acknowledged the same to be his act and deed.

Given under my hand this 4th Dec., 1871.

WM. B. FOSTER,
Commissioner in Ch'y.

VIRGINIA, *Wythe County, to wit*:

I, David E. Davis, a notary public in and for the aforesaid county, do certify that David E. James, whose name is signed to the writing above, bearing date the 4th day of December, 1871, personally
123 appeared before me in my county aforesaid, and acknowledged the same to be his act and deed.

Given under my hand this 30th day of December, 1872.

D. E. DAVIS, *N. P.*

VIRGINIA, *Wythe County, to wit:*

I, David E. Davis, a notary public in and for the aforesaid county in said State, do certify that Mary M. James, the wife of Hansford James, whose name is signed to the writing above, bearing date on the 4th day of December, 1871, personally appeared before me in my county aforesaid, and being examined by me priv'y and apart from her husband, and having the writing fully explained to her, she acknowledged the same to be her act and deed; that she willingly executed the same and
124 does not wish to retract it. Given under my hand this 30th day of December, 1872.

D. E. DAVIS, *N. P.*

Virginia, Wythe County, to wit:

I, David E. Davis, a notary public in and for the aforesaid county in said State, do certify that Mary M. James, the wife of Hansford James, whose name is signed to the writing above, bearing date on the 4th day of December, 1871, personally appeared before me in my county aforesaid, and being examined by me priv'y and apart from her husband, and having the writing fully explained to her, she acknowledged the same to be her act and deed; that she willingly executed the same and does not wish to retract it.

Given under my hand this 21st day of January, 1875.

DAVID E. JAMES, N. P.

125 SMYTHE COUNTY, VA., *to wit:*

This is to certify that James Ward, as trustee, named in the foregoing deed, came personally before me, Samuel Wilkinson, an acting magistrate for the county and State aforesaid, and acknowledged the same to be his act and deed, and he requested me to certify the same to the clerk of the county court of Smythe County, that it may be duly recorded. Given under my hand and seal this January 25th, 1875.

SAMUEL WIKINSON, J. P. [SEAL.]

VIRGINIA:

In the clerk's office of Smythe County court, 25 January, 1875.

The within deed of bargain and sale from Hansford James and wife et al. to J. J. M. Wilson, bearing date on the 4th December, 1871,
126 was presented in the office aforesaid, the above date, and with the

certificate of acknowledgment and privy examination, annexed, admitted to record.

Teste: JOHN R. SEXTON, *D. C.*

EXHIBIT C.

On or before the 25th day of December next, I promise to pay David E. James one hundred and five dollars, for value received of him. Witness my hand and seal this the 23d of January, 1860.

HANSFORD JAMES. [SEAL.]

Assignment.

For value received, I assign the within note to P. B. Snapp.

D. E. JAMES.

On or before the twenty-fifth day of December next, I promise to pay David E. James one hundred dollars for value received of him,
127 bearing interest after two months from this date, the *the* 28th January, 1860.

HANSFORD JAMES. [SEAL.]

Assignment.

For value received, I assign the within note to P. B. Snapp.

D. E. JAMES.

EXHIBIT D.

On on before the 25th of December next, I promise to pay D. E. James one hundred and twenty-two dollars and fifty cents, with interest from date, this 6th June, 1860.

HANSFORD JAMES.

Assignment.

I assign the within note to P. B. Snapp, for value received, June 11th 1860.

D. E. JAMES.

At a district court of the United States for the western district of Virginia, at Abingdon, on Tuesday, the 2d day of November, 1875.

128 M. MCCORMACK, PETITIONER,
vs.
DAVID E. JAMES ET AL., DEFENDANTS.

This cause came on this day to be heard upon the bill of review of the petitioner, the answers of the defendants and general replications thereto, the exhibits filed and the papers of the original cause, and was argued by counsel.

On consideration whereof the order of this court made on the 21st November, 1872, is reversed and annulled, and it is further ordered that the injunction heretofore granted and dissolved is hereby reinstated. And it appearing to the court that the bankrupt, Hansford James, had long prior to the filing of his petition in bankruptcy parted with the

legal title and his equity of redemption to the land in plaintiff's
129 bill mentioned, the court is of opinion that no title, either legal or equitable, to said land passed to the assignee of the bankrupt by the deed of assignment in bankruptcy. It is therefore further ordered that the sale heretofore made of said land by said assignee be set aside, vacated, and annulled, and that the plaintiff have a writ of possession therefor. And it appearing to the court that there is a lien reserved against said land by David E. James, which he claims is prior in date to plaintiff's purchase, and that the lien is still subsisting and valid, and it further appearing that there is still a balance of purchase money due from the pet., and that he claims to be entitled to rents and
130 profits for the use of said land during the time that he has been disposs'ed thereof, it is further ordered that he so amend his bill as to bring these matters and any others, as he may be advised, before this court, and this cause is continued. The above decree having been improperly entered upon the order book of the circuit court at the last term, it is now ordered that the said decree be entered here nunc pro tunc.

The following is the answer of Hansford James referred to in the foregoing answer of David E. James:

In the district court of the United States for the western district of Virginia, at Abingdon.

To the honorable Alexander Rives, judge:

131 The separate answer of Hansford James to an amended and supplemental bill brought in this honorable court by one Micajah McCormack as compl't against one D. E. James, your respondent, and others, does hereby demur to said bill for want of equity apparent on its face, but if he should be held to answer said bill, he answering says, that so far as he is personally concerned he is in no wise interested in this suit, and is only brought into it in connection with the parties litigant, D. E. James and said McCormack, with whom your respondent had transactions prior to his bankruptcy. Your respondent has read the bill of said McCormack and finds it is much at fault in its material statements. It is true, as stated in said bill, that on 19th May, 1863,
132 he sold to said McCormack by parol contract the parcel of land referred to, and that the price of $7,500.00 was paid in Confederate currency at the time, and for residue, $1,000.00, said McCormack executed to respondent his bond payable two years after date, which were same lands that had been conveyed in trust by respondent to James Ward, trustee, to secure D. E. James et al. on 25th April, 1861. So far as the rents and profits are concerned respondent has had little to say except that D. E. James has made valuable improvements on said land after he was placed in possession under order of Judge John C. Underwood. As to the deed of trust of said D. E. James referred to, your respondent avers that it is valid and bona fide. Said deed of trust
133 was executed by respondent to said Ward, trustee, to secure D. E. James in said sum of $2,225.00, and it was a perfectly honest and valid transaction, not made by fraud, covert, or collusion; and said debt with its accrued interest is justly due and owing to said D. E. James in whole, and was for full, fair, and bona fide consideration as follows: said D. E. James at your respondent's request paid off a large number of debts for him and paid him various sums of money. He paid off for respondent a bond of $67.00 with interest from 22d December, 1860,

due from respondent to one James Ward, and lifted said bond. He also paid one T. P. James $70 00 for respondent. He paid one David Copenhaver about $200.00 for respondent. *He paid.* He paid to the dep-
134 uty sheriff Smythe , E. A. Scott for respondent on a debt due from respondent to James O. Bell on 25th April, 1861, the sum of $1,141.22, and the balance of the trust was paid in cash to respondent except a note of $779.00 due to said D. E. James from respondent for horses sold in the South. So far from there being a want of consideration for said deed it was found out afterward that said D. E. James had really overpaid your respondent the sum of $2,225.00 as he held a store account, recording deed, and for cash furnished respondent at various times. Your respondent has not had occasion to cast up the settlement between himself and D. E. James for some time, but he now here in express terms denies the allegations of compl't's bill, so far as it charges that the full amount of principal and interest of deed of trust is yet due
135 and justly owing to said D. E. James. The full amount of said $2,225.00 was settled with and for your respondent's benefit as the consideration of said deed, and it is all still due D. E. James besides much more not really embraced in the deed. Said D. E. James assigned to one P. B. Snapp three bonds of respondent to said D. E. James, amounting to about $610.00 principal and interest, and upon recourse had by said Snapp against D. E. James he was forced from pecuniary embarrassments of respondent to pay it to said Snapp, and this is also part of the debts secured in said deed of trust, as will be seen from examination. So respondent is not only due said D. E. James on account of said trust the $2,225.00 on D. E. James' own debts, but also said D. E. James is entitled to the benefit of the debts secured to said P. B.
136 Snapp in said deed of trust, in addition to other and distinct liabilities due said D. E. James from respondent. Respondent further answering denies totally that said McCormack was ignorant of the existence of the deed of trust of 25th April, 1861, for D. E. James et als. benefit when he purchased by word of mouth said trust land from respondent on 19th May, 1863. Respondent avers that he, said McCormack, had full knowledge of the existence of said D. E. James' lien, and spoke of it to respondent at time of trade, as well as often before and subsequent to the trade in May, 1863. Your respondent avers that it was the effort of said McCormack to buy said lands from respondent without imparting the fact to said D. E. James, and said McCormack requested respondent to keep the transaction concealled from said
137 D. E James. Respondent is sure said McCormack had full knowledge of the existence of the deed of D. E. James' lien, as he actually spoke at one time of purchasing from D. E. James the said trust. Respondent did not approach said McCormack to induce him to buy the land as he states in his bill, but the approach was made by himself; nothing was concealed from him; he bought the land with his eyes open, and he never dreamed of complaining of concealment of any facts till this suit. Respondent further answering says, that so far as he knows said D. E James was not cognizant of any efforts on respondent's part to sell or of said McCormack to buy said trust land, and said D. E. James emphatically never advised respondent to sell it to said McCor-
138 mack. Said McCormack did not reside in Smythe Co., where the land was situate, and where the deed was of recordation, but he was at Marion often, nearly every court, and was easily accessible to both the land and clerk's office. As a further fact shewing conclusively that said McCormack knew all about the deed of trust, respond' here positively avers that on more than one occasion before the 19th May,

1863, date of McCormack's purchase, said McCormack proposed to lend respondent, who is his brother-in-law, money sufficient to pay off the deed of trust to said D. E. James; and circumstances alone prevented him from so doing. Surely he had full and accurate knowledge of the trust, and no one advised him, but he
139 acted on his own responsibility and at his own instance in the whole matter. Your respondent has answered thus fully as he was called upon in said bill to answer all of the allegations thereof. And now, in conclusion, says again that said deed was for fair value, bona fide; that nothing has been paid on it; that the whole of it is due said D. E. James, and much more besides; that said McCormack had full and complete knowledge of the existence of the deed on the 19th May, 1863, date of his trade, and bought it subject to said trust lien, without any interference or advice of D. E. James, so far as respondent knows. And now, having answered fully the said bill, he prays to be hence dismissed with his costs, &c.; and as in duty bound, &c.

HANSFORD JAMES.

CROCKETT & BLAIR,
Pro Resp'd't.

140 WYTHE CO., *to wit:*

This day personally appeared before me the undersigned, C. B. Thomas, N. P. for Wythe, Hansford James, respondent in this case, who made oath that the facts contained in this answer are true to the best of his knowledge. Given under my hand this 21st October, 1875.

C. B. THOMAS,
N. Public.

(Endorsed:) Filed this 3d Nov., 1875. B. Gildersleeve, dist. cl'k.

The following is a copy of the petition of D. E. James:

In the U. S. dist. c't, western *western* district of Va., at Abingdon.

To the Hon. Alexander Rives, judge thereof:

141 The petition of said David E. James, of Wythe Co., Va., and within said judicial district, would respectfully represent to your honor that at the term of the above named court, held on 12th June, 1875, at Abingdon, there was entered a decree in the case of Micajah McCormack vs. your petitioner upon a bill of review, the record of which said proceedings are herewith exhibited marked X, and are prayed to be read and considered as part of this petition. From said record, and particularly from said decree rendered on said 12th June, 1875, among other things, it was adjudged, ordered and decreed that your petitioner's lien referred to is a lien against the tract of land in said case named, which said lien is the sum of twenty two hundred and twenty five dollars $2,225.00, with interest thereon from 21st April, 1861, as will
142 more fully appear from the deed of trust executed on last-named day by said Hansford James to James Ward, as trustee, to secure said petitioner, David E. James, and that thereupon the tract of land in controversy in said suit, which is 280 acres, more or less, of land situate in Smythe County, Va., fully described in said deed of trust. And further, said decree of 12th June, 1875, adjudges, orders, and decrees, that your petitioner's said lien is a prior lien to the purchase of said Micajah McCormack, and that your petitioner's lien is still subsisting and valid

and due from said Hansford James to your petitioner. And said decree further reciting that said McCormack claims rents and profits, &c., proceeds to order an amendment of said bill of review to bring said matters, and any others, &c., in and before the court. Now your
143 petitioner, David E. James, whose lien of $2,225.00, with its interest from said 21st April, 1861, has been deemed as binding on said land claimed by said McCormack under his parol contract, now comes into your honor's court and avers that he is entitled to the specific enforcement of his said lien against said land unless said Micajah McCormack shall within a reasonable time pay said lien off to your petioners.

Said McCormack under said decree takes said land subject to your petitioners' liens aforesaid, and unless he pay the same it must go to sale.

Your petitioner would show that said McCormack has not in conformity with said decree of June 12th, 1875, amended his said bill, but stands out and fails to do so, or to pay to your petitioner his said lien which now exceeds $4,000.00. Your petitioner further avers that
144 under said decree W. O. Austin, deputy marshal of your hon'l court has a writ of habere facias possessionem for the purpose of dispossessing your petitioner and his vendee, J. J. M. Wilson, to whom your petitioner, the trustee, and said Hansford James sold said land, as will appear from Exhibit "W," and unless he be prevented, will certainly do so.

Your petitioner insists that more than two (2) years having elapsed from date of discharge of said Hansford, that no part of his proceedings could be enquired into or impeached; that more than three (3) years having elapsed from final order dismissing said McCormack's bill by Hon. John C. Underwood at Richmond, and that too in a case in which the entire merits of case were adjudicated, it was equally too late
145 by bill of review to reopen said case; that said district court at Abingdon, while it has jurisdiction of bankrupt cases proper, had no jurisdiction of this bill of review; that the record shows upon its face patent error, in this, that the bill of review is brought in the U. S. district court, and addressed to the Hon. Alex. Rives, judge of the district court of the United States for the western district of Va., at Abingdon, while the decree of June 12th, 1875, complained of, is entered at a circuit court of the United States continued and held for the western district of Virginia, at Abingdon, on Saturday, 12th June, 1875. Your petitioner would further represent that since the last term of your honor's court he has obtained valuable and material evidence in his case, evidence not merely cumulative, but of a substantive and
146 independent character, and which petitioner is advised and believes will on a future hearing materially change the judgment of the court, and that said evidence is newly discovered and by diligent search could not till now have been obtained. The effect of that evidence will be to show by indisputable proof that said McCormack has before his bill of review entirely surrendered and abandoned his supposed verbal contract with said Hansford James for valuable consideration, and further to prove his admissions of and acquiescence in and consent to your petitioner's purchase from said assignee and ownership of said land referred to. Your petitioner as before stated after his purchase of said land at the assignee's sale, sold and conveyed the same to one J. J. M. Wilson, by deed of 4th December, 1871, for the con-
147 sideration of $4,000.00 paid him in hand, and in which said Hansford James & wife, Holbrook, assignee, James Ward, trustee in

said deed of trust of 21 April, 1861, and your petitioner united, your petitioner conveying with general warranty to said Wilson said land, who was placed in possession thereof. Your petitioner is now prepared to prove that said McCormack in 1871 approved and ratified this sale to said Wilson by after-discovered evidence that he could not with due diligence obtain before June 12th, 1875. Said Wilson is an innocent purchaser of said land without any notice of said McCormack's pretended purchase, and will insist on it and his general warranty of your petitioner, of which your petitioner is advised he can also avail himself in this application for new trial. The magnitude of this case to your
148 petitioner, and the fearful and fatal pecuniary results to him from decree of June 12th, 1875, induce him to present this petition for rehearing or bill of review. He says that he was profoundly surprised to hear of such decree, as your honor distinctly announced from the bench, at Abingdon, that you would simply at that term (June, 1875) direct an account between Hansford and D. E. James to ascertain if any payments had been made to petitioner on his deed of trust, and would reserve the other matters for further consideration. Your petitioner avers that his counsel, F. S. Blair, left Abingdon under this impression, and that the counsel for McCormack informed said Blair that he would draw the order accordingly, and reposing confidence in said statement said
149 Blair left on the morning train. Had he understood the decree to be on its merits, he had valuable matters to present to the court against such course, and failing that he would have reserved the right of an order of supervision or an appeal. He avers that he and his counsel are both taken by much surprise in the said order of June 12th, 1875, and thinks your honor will relieve them from such surprise as it works grevious results to your petitioner. He does not ask for this for mere purpose of delay, but from motives of honesty and good faith. He files as part of his petition the record X, and your petitioner avers that it was the duty of said McCormack long since to pay off your petitioner his unpaid lien on said land as he took it subject to same, and failing to do so your petitioner asks to have it specifically enforced by a
150 sale of said land. Further averring petitioner says that said McCormack should not be placed in possession of said lands, as he is pecuniarly as to his personable estate insolvent and unable except and unless from his real estate to pay said lien and great and damaging results will ensue if he be put in possession of it. It will be seen from said deed, marked W, that said J. J. M. Wilson, your petitioner's vendee, is the owner and occupier of said land for value, and your petitioner insists that he remain there. Your petitioner avers that said McCormack cannot pay your petitioner his $4,000.00 lien and release said land, but if he be permitted to take it now he will greatly impair its value and its security to your petitioner under his deed of trust. In tender consideration whereof as forasmuch as your petitioner is remediless save
151 in a court of equity, the prayer of your petitioner is that James Ward, trustee in said deed, Micajah McCormack, J. J. M. Wilson, G. J. Halbrook, assignee of said Hansford James, Hansford James and W. O. Austin, deputy marshall, be made parties defendant to this petition, and be required to answer the same on oath; that said McCormack be compelled to pay to your petitioner said sum of $2,225.00 and its interest, from 21st April, 1861, or in default thereof that said land be sold to pay the same; that said Micajah McCormack and W. O. Austin, deputy marshall, their agents and attorneys, be restrained from all further proceedings under said decree of June 12th, 1875, and the writ of possession issued thereon, and that your petitioner may have

such other further and general relief as his case may require or
152 to equity may seem meet, and as in duty bound, &c., may the U. S. process of subpœna issue, &c., and as in duty bound he will ever pray, &c.

DAVID E. JAMES.

CROCKETT & BLAIR,
Attorneys.

On the back of the foregoing petition is the following endorsement:

Upon motion of D. E. James, and for good cause shewn, it is ordered that he have leave to file this his petition, and for process on same, and a restraining order is awarded him to restrain Micajah McCormack, his agents and attorneys, and W. O. Austin, and all others, from all further proceedings under the order or decree of 12th June, 1875, referred to in petition, until the further order of court, unless said McCormack shall, within 90 days from this order, pay to said D. E. James his lien
153 referred to in his petition.

ALEX. RIVES,
Dist. Judge.

To cl'k U. S. dist. court at Abingdon.

Received and filed 13th September, 1875, and r. o. issued.
B. GILDERSLEEVE, *Clk.*

Exhibit X, record on bill of review, referred to in the foregoing petition, already copied.

Exhibit W, deed of D. E. James and others to J. J. M. Wilson, referred to in foregoing petition, is the same as Exhibit X, referred to in his (D. E. James') answer.

In the district court of the United States for the western district of Virginia, at Abingdon.

To the Hon. Alexander Rives, judge of said court:

154 The demurrer and answer of Micajah McCormack to a petition filed against him and others in this hon. court, upon which a restraining order was awarded on the 19th day of August, 1875.

Respondent, by protestation, not confessing any of the matters contained in said petition to be true, but expressly denying the same, demurs to said petition because he is advised it is not sufficient in law, and for causes of demurrer he assigns the following, viz:

1st. The restraining order was granted without notice to this respondent, and there is no cause of irreparable injury from delay shown in said petition, nor is the petition verified by affidavit or other evidence.

2d. The petitioner has had reasonable time to apply to the judge of the circuit court for his restraining order, and has failed to do so.

155 The exhibit (marked X) is not filed with the petition.

4th. The proceeding should have been by bill and not by petition.

5th. That the statute of limitations relied upon in the petition was expressly pleaded and relied upon by the petitioner in his answer to the bill of review named in the petition; it is therefore res adjudicata.

6th. And lastly, because there is no equity in the bill, and respondent

not waiving his demurrer, but expressly relying thereon should he be held to further answer said petition, for answer thereto says:

He admits that a decree was entered on the 12th day of June, 1875, on the bill of review of this respondent against petitioner and others, and he admits that he has failed to amend his said bill of review, as provided by said decree, but he denies
156 that his failure to so amend arose from any desire or purpose on his part not to comply with your honor's decree. On the contrary, your honor indicated that you would direct an account upon said bill as it was, but as a matter of precaution respondent, by his counsel, asked leave to amend said bill, so as to bring this matter directly before the court before the account would be ordered. The failure to amend was a mere omission which respondent intends to supply.

Respondent asserts that in delivering his opinion the court declared that respondent was entitled to an account as the case then stood, and if either petitioner or his counsel were present in court when the opinion was delivered, he heard said announcement.

Respondent further asserts that the decree was prepared in
157 strict conformity with the views of the court, except that it did not order an account for the reason before stated.

Respondent further asserts that when the decree prepared by his counsel was presented to the court, the court called attention to the fact that no provision had been made for the taking of an account, and asked why it had not been done, when respondent's counsel stated that he preferred to amend the bill before the account was ordered; whereupon the court assented, and directed said decree to be entered.

Respondent denies most emphatically that the opinion of the court was limited to the mere matter of account, and all other questions reserved as petitioner now alleges and pretends. And respondent is informed by his counsel that they never so understood the court
158 and never consented to prepare such a decree. Respondent would regard it as presumptuous in him to attempt to defend this court from the imputation that he had permitted counsel to enter a decree in this cause different from the opinion entertained and announced by the court.

Respondent, further answering, would shew unto your honor that the charge in the petition as to his insolvency as to personal estate, if not nonsensical, is utterly and entirely without foundation in fact. He charges that he is the owner of and now in possession of personal estate of more than twice the value the petitioner will ever be able to show he is entitled to by reason of the lien of his deed of trust. Petitioner, reckless as he is in the charges in his petition, has not had the hardihood to charge respondent with insolvency, because he knows that in ad-
159 dition to his personal estate, and his land in Smythe County, he is the owner of an unencumbered real estate in the county of Washington, worth not less than $18,000.00; and respondent begs leave to state that he will not want 90 days to pay the amount due to petitioner by reason of his deed of trust when it is ascertained what is due him, but he will pay it in a much shorter time if so ordered. Respondent will here state what he should have sooner stated, that he has been somewhat delayed in amending his bill by propositions of compromise submitted by petitioner since the decree complained of was rendered.

Respondent denies that he did in 1871, or at any other time, approve and ratify the sale made by petitioner to J. J. M. Wilson of the land in controversy, nor is he, Wilson, now asking for relief on
160 account of any such approval or ratification upon the part of re-

spondent. On the contrary he has taken a lease of said land from respondent as will hereafter be fully shown. Respondent denies that he did, before he filed his bill of review, abandon his contract with Hansford James for a valuable consideration, or for any consideration. And he further denies that he ever admitted, or acquiesced in, or consented to, or at the time was aware of the purchase by petitioner from the assignee of Hansford James of said land; the whole statement of the petitioner in this particular is utterly without foundation in fact. Respondent would further shew unto your honor that the writ of possession au-

thorized by your honor at the last term of the court bears date
161 on the 28th day of June last *last* and was executed upon the 5th day of July last, and Wilson surrendered possession of said land at once to respondent as appears by said writ and the return thereon filed in the papers of said cause. This was more than a month before petitioner presented his petition, and more than two months before the restraining order endorsed theron was served upon respondent. Respondent received possession of said land when surrendered by Wilson, as before stated, and soon thereafter and before said petition was presented to your honor he leased said land to said Wilson, who has thence hitherto held it as respondent's tenant, all of which facts were well known to petitioner when he filed his petition pretending that respondent had not yet gotten possession of the land.

162 And having answered said petition as fully as he is advised it is material for him to answer, and denying all matter therein contained not herein specially admitted or denied, he prays that the restraining order awarded upon said petition be dissolved and that the petition be dismissed, and that respondent be hence dismissed with his costs, &c.; and he will ever pray, &c.

MICAJAH McCORMACK,
By Counsel.

CAMPBELL & TRIGG, *Counsel.*

UNITED STATES OF AMERICA,
Western District of Va., sct:

This day before me, B. Gildersleeve, a commissioner of the United States court for the western district of Virginia, personally came
163 Micajah McCormack, and made oath in due form of law that the facts set forth in the foregoing answer so far as they purport to be made of his own knowledge are true, and that the residue thereof he believes to be true. Given under my hand and seal this 16th day of September, A. D. 1875.

B. GILDERSLEEVE,
U. S. Commissioner, W. Dist. of Va.

(Endorsed:) Filed this 16th day of September, 1875. B. Gildersleeve, dist. clerk.

At a district court of the United States, continued and held for the western district of Virginia at Abingdon, on Wednesday the 3d day of November, 1875.

DAVID E. JAMES
v.
McCORMACK ET ALS.

164 This cause came on this day to be heard upon the petition of David E. James, and the demurrer and answer of M. McCormack,

and on his motion the restraining order granted on said petition on 19th of August, 1875, is dissolved, and it is further ordered that respondent McCormack recover from said David E. James his costs in this behalf expended, and on motion of said David E. James an appeal is allowed him from this order upon his executing bond, with good security, in the penalty of $1,000.00, conditioned as required in such cases in suits in equity, within sixty days.

The following is a copy of the appeal bond:

District court of the United States, western district of Va.

165 MICAJAH MCCORMACK }
vs.
DAVID E. JAMES ET ALS. }

Know all men by these presents that we, David E. James and Frank S. Blair, are held and firmly bound unto Micajah McCormack, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this twenty-second day of February, A. D. 1876.

Whereas the above-named David E. James desiring to appeal to the circuit court of the United States for the western district of Va. to reverse the decree of the district court of the United States for the western district of Virginia:

166 Now, therefore, the *obliga*tion of this obligation is such that if the above named David E. James shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

DAVID E. JAMES. [SEAL.]
FRANK S. BLAIR. [SEAL.]

Sealed and delivered in presence of—
B. GILDERSLEEVE, *Clerk.*

On this 22d day of February, A. D. 1876, personally came Frank S. Blair before me, B. Gildersleeve, U. S. clerk, who, being duly sworn did depose and say that he was worth one thousand dollars over and above all his just debts and liabilities.

B. GILDERSLEEVE,
U. S. Clerk W. Dist. of Va.

167 At a district court of the United States, continued and held for the western district of Va. at Abingdon, on Wednesday, the 3d day of November, 1875.

DAVID E. JAMES }
v.
MCCORMACK ET ALS. }

This cause came on this day to be heard upon the petition of David E. James and the demurrer and answer of M. McCormack, and on his

motion the restraining order granted on said petition on 19th August, 1875, is dissolved, and it is further ordered that respondent McCormack recover from said David E. James his costs in this behalf expended, and on motion of said David E. James an appeal is allowed him from this order upon his executing bond with good security in the
168 penalty of $1,000.00, conditioned as required in such cases in suits in equity, within sixty days.

ALEX. RIVES,
Dist. Judge.

3D NOVEMBER, 1875.

I hereby certify that the foregoing is a true copy of the order entered by the court in the matter of David E. James vs. McCormack et als. on the 3d day of November, 1875.

Teste:

B. GILDERSLEEVE,
C. D. C. U. S. W. D. of Va.

MEMO.—Bond has been executed with Frank S. Blair as security.

B. GILDERSLEEVE,
Dist. Clerk.

(Endorsements:) David E. James vs. McCormack et als. Copy of order.

I acknowledge legal service of the within decree and notice this 10th day of March, 1876.

M. McCORMACK,
169 By his counsel, CAMPBELL & TRIGG.

Clerk's office of the district court of the United States.

I, B. Gildersleeve, clerk of the said court, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings of said court in the case of Micajah McCormack against Hansford James and others.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court at Abingdon in the said western district on this the 21st day of March, 1876.

[SEAL OF THE COURT.] B. GILDERSLEEVE,
Dist. Clerk.

End of transcript of record from U. S. district court at Abingdon.

170 And at another day, to wit, at a circuit court of the United States for the western district of Va., continued and held at the court rooms thereof, in the city of Lynchburg, on Tuesday, the 28th day of March, 1876.

D. E. JAMES AND HANSFORD JAMES, APPELLANTS,
vs.
MICAJAH MCCORMACK AND OTHERS, APPELLEES.

On an appeal from the district court of the United States for the western district of Virginia, at Abingdon, Va.

This day appellant, by counsel, appeared and asked leave to file the record of his appeal, but the judge deeming himself disqualified from sitting in the cause by reason of his having sat in the court below and decided the same, abstains from any judgment
171 upon the regularity or validity of said appeal, and only orders the same to be docketed for the decision of the circuit judge.

and on his motion the restraining order granted on said petition on 19th of August, 1875, is dissolved, and it is further ordered that respondent McCormack recover from said David E. James his costs in this behalf expended, and on motion of said David E. James an appeal is allowed him from this order upon his executing bond, with good security, in the penalty of $1,000.00, conditioned as required in such cases in suits in equity, within sixty days.

The following is a copy of the appeal bond:

District court of the United States, western district of Va.

165 MICAJAH MCCORMACK
vs.
DAVID E. JAMES ET ALS.

Know all men by these presents that we, David E. James and Frank S. Blair, are held and firmly bound unto Micajah McCormack, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated this twenty-second day of February, A. D. 1876.

Whereas the above-named David E. James desiring to appeal to the circuit court of the United States for the western district of Va. to reverse the decree of the district court of the United States for the western district of Virginia:

166 Now, therefore, the *obligation* of this obligation is such that if the above named David E. James shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

DAVID E. JAMES. [SEAL.]
FRANK S. BLAIR. [SEAL.]

Sealed and delivered in presence of—
B. GILDERSLEEVE, *Clerk.*

On this 22d day of February, A. D. 1876, personally came Frank S. Blair before me, B. Gildersleeve, U. S. clerk, who, being duly sworn did depose and say that he was worth one thousand dollars over and above all his just debts and liabilities.

B. GILDERSLEEVE,
U. S. Clerk W. Dist. of Va.

167 At a district court of the United States, continued and held for the western district of Va. at Abingdon, on Wednesday, the 3d day of November, 1875.

DAVID E. JAMES
v.
MCCORMACK ET ALS.

This cause came on this day to be heard upon the petition of David E. James and the demurrer and answer of M. McCormack, and on his

motion the restraining order granted on said petition on 19th August, 1875, is dissolved, and it is further ordered that respondent McCormack recover from said David E. James his costs in this behalf expended, and on motion of said David E. James an appeal is allowed him from this order upon his executing bond with good security in the
168 penalty of $1,000.00, conditioned as required in such cases in suits in equity, within sixty days.

ALEX. RIVES,
Dist. Judge.

3D NOVEMBER, 1875.

I hereby certify that the foregoing is a true copy of the order entered by the court in the matter of David E. James vs. McCormack et als. on the 3d day of November, 1875.

Teste:

B. GILDERSLEEVE,
C. D. C. U. S. W. D. of Va.

MEMO.—Bond has been executed with Frank S. Blair as security.

B. GILDERSLEEVE,
Dist. Clerk.

(Endorsements:) David E. James vs. McCormack et als. Copy of order.

I acknowledge legal service of the within decree and notice this 10th day of March, 1876.

M. McCORMACK,
169 By his counsel, CAMPBELL & TRIGG.

Clerk's office of the district court of the United States.

I, B. Gildersleeve, clerk of the said court, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings of said court in the case of Micajah McCormack against Hansford James and others.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court at Abingdon in the said western district on this the 21st day of March, 1876.

[SEAL OF THE COURT.] B. GILDERSLEEVE,
Dist. Clerk.

End of transcript of record from U. S. district court at Abingdon.

170 And at another day, to wit, at a circuit court of the United States for the western district of Va., continued and held at the court rooms thereof, in the city of Lynchburg, on Tuesday, the 28th day of March, 1876.

D. E. JAMES AND HANSFORD JAMES, APPELLANTS,
vs.
MICAJAH MCCORMACK AND OTHERS, APPELLEES.

On an appeal from the district court of the United States for the western district of Virginia, at Abingdon, Va.

This day appellant, by counsel, appeared and asked leave to file the record of his appeal, but the judge deeming himself disqualified from sitting in the cause by reason of his having sat in the court below and decided the same, abstains from any judgment
171 upon the regularity or validity of said appeal, and only orders the same to be docketed for the decision of the circuit judge.

And at another day, to wit, at a circuit court of the United States for the western district of Virginia, continued and held at the court rooms thereof, in the city of Lynchburg, on Wednesday, the 29th day of March, 1877.

Present, Hon. Hugh L. Bond, circuit judge, presiding alone.

DAVID E. JAMES AND HANSFORD JAMES, appellants,
vs.
MICAJAH MCCORMACK AND OTHERS, appellees.

On an appeal from the U. S. district court W. district of Va., at Abingdon, Va.

172 This day came David E. James, appellant, by J. F. Johnston and Crockett & Blair, his attorneys, and presented a transcript of the record in said cause, duly certified by B. Gildersleeve, clerk of said court, and it appearing to the court here that on Wednesday, the 3d day of November, 1875, an appeal was allowed said appellant, David E. James, that from the certificate of said district court clerk the said appellant has executed his bond as prescribed by law, in the penalty of one thousand dollars, approved of by said clerk, and that all the requirements of the law in cases of appeals have been fully complied with, upon the motion of said appellant, by his said attorneys, it is ordered that said cause be docketed here, and that said appellee, McCormack, be restrained from all further proceedings in the court below until
173 the adjudication of this appeal in this court, and that the cause be set for hearing at Lynchburg on the 15th day of June, 1876, at the court-house; provided that notice of the time and place of hearing be served on defendant or his counsel within twenty days from the date of this order, and that leave be given to defendant to move to dissolve the order of injunction herein at any time, upon giving ten days' notice to complainants thereof.

Upon the foregoing order there is the following endorsement, to wit:

Endorsement:

Served the within by delivering a true copy of this order on Micajah McCormack the 8th day of April, 1876.

G. S. SMITH,
Sp'l D. U. S. Marshal.

174 And now at this day, to wit, at a circuit court of the United States for the western district of Virginia, continued and held at the court-rooms thereof, in the city of Lynchburg, on the day of March, 1877 (being the day and year first herein mentioned).

DAVID E. JAMES AND HANSFORD JAMES, appellants,
vs.
MICAJAH MCCORMACK AND OTHERS, appellees.

On an appeal from the district court of the United States for the western district of Virginia at Abingdon, Va.

The transcript of the record of the proceedings in the court below and

the orders passed in this cause in this court having been seen and
175 inspected, and together with the arguments of counsel maturely considered, the court here is of opinion that there was no error in the decrees of the court below, passed on the 12th June, 1875, and on the 3d day of November, 1875, from which decrees the appellants' appeal was taken; this court doth therefore hereby affirm the said decrees of the 12th of June and of the 3d of November, 1875, of the said court below in this cause, and it is adjudged, ordered, and decreed that the appellee recover of the appellant, David E. James, his costs about his defense here in this behalf expended, and the appellants' appeal is dismissed; which is ordered to be certified to the court below.

On motion of David E. James, an appeal from this decree is
176 allowed him upon his executing bond within sixty days, with good security, to be approved by the clerk of this court, in the penalty of one thousand dollars, conditioned as required in such cases in suits in equity.

And at another day, to wit, on the 28th day of August, 1877, came said David E. James and filed his appeal bond, which said bond is in the words and figures following, to wit:

Circuit court of the United States for the western district of Va.

DAVID E. JAMES AND HANSFORD JAMES
vs.
MICAJAH MCCORMACK.

Know all men by these presents that we, David E. James, P. M. Newland, and J. M. Painter, are held and firmly bound unto
177 Micajah McCormack in the sum of one thousand dollars, to be paid to the said Micajah McCormick, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and assigns, and administrators firmly by these presents, sealed with our seals and dated this 28th day of July, A. D. 1877.

Whereas the above named David E. James hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the circuit court of the United States for the western district of Virginia:

Now, therefore, the condition of this obligation is such that
178 if the above named David E. James shall prosecute his appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

D. E. JAMES. [SEAL.]
P. M. NEWLAND. [SEAL.]
J. M. PAINTER. [SEAL.]

VIRGINIA,
Wythe Co., to wit:

This day personally appeared before me, W. G. Gaines, a justice of the said county, David E. James, P. M. Newland, and J. M. Painter, and acknowledged their signatures to the within bond.

Given under my hand this 28th day of July, 1877.

WM. G. GAINES, *J. P.*

VIRGINIA,
Wythe County, to wit:

179 I, Wm B. Foster, clerk of Wythe County court, do certify that Wm. G. Graves, whose signature appears to the above certificate,

dated 28th July, 1877, was at the time of signing the same is now a justice of the peace in and for the county of Wythe, duly elected and qualified, and to all whose official acts as such full faith and credit are due. I further certify that I am acquainted with the handwriting of the said Wm. G. Graves, and I believe his said signature to be genuine. And I further certify that I am well acquainted with the principal and sureties in the within bond, and I believe them to be worth largely over the penalty of said bond exclusive of their homestead and other exemptions allowed by law.

Witness my hand and seal of Wythe County court this 7th day of August, 1877.

[SEAL.] WM. B. FOSTER,
Clk of Wythe County Ct.

180 Within bond approved.

S. PATTERSON,
Clk Cir. Ct.

UNITED STATES OF AMERICA,
Western District of Va.:

I, S. Patterson, clerk of the circuit court of the United States for the western district of Va., do certify that the foregoing is a true transcript of the record and proceedings of a certain suit lately depending in said court, wherein David E. James and Hansford James were appellants, and Micajah McCormack appellee.

In witness whereof I hereto set my hand and annex the seal of said court, at Lynchburg, in said district, this 28th day of August, 1877.

[SEAL.] S. PATTERSON, *Clk.*

181 LYNCHBURG, VA., *M'ch 22nd*, 1877.

To Mr. MICAJAH M'CORMACK:

Notice is hereby given you that I will appeal from the decree of the circuit court of the United States, at Lynchburg, in the case of you vs. David E. James, G. J. Holbrook, assignee, & Hansford James, to the Supreme Court of the United States, at Washington, D. C., and this citation is to inform you of that fact, the record of which case will be transmitted at once to the clerk of said Supreme Court.

DAVID E. JAMES.

182 Delivered a copy of within to Micajah McCormack, at Lynchburg, on Thur'd'y, 22 M'ch, '77.

F. S. BLAIR.

We accept service of this notice, this 22nd M'ch, 1877.

M. McCORMACK,
By counsel, CAMPBELL & TRUIGG.

(Indorsed:) David E. James vs. M. McCormack. Citation of appeal. 22d M'ch, '77.

(Indorsement on cover:) No. 166. David E. James, appellant, vs. Micajah McCormack. West. dist. Virginia, C. C. U. S. Filed 8th March, 1879.

Supreme Court of the United States.

NO. 166.

DAVID E. JAMES, APPELLANT,

vs.

MICAJAH McCORMACK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA.

BRIEF OF JOHN W. JOHNSTON, OF COUNSEL FOR MCCORMACK.

DAVID E. JAMES, APPELLANT,

vs.

MICAJAH McCORMACK.

BRIEF OF JOHN W. JOHNSTON OF COUNSEL FOR McCORMACK.

One Hansford James, being the owner of a tract of land in Smyth county, Virginia, the 25th of April, 1861, executed a deed of trust to James Ward to secure sundry creditors. Record p 15. Afterwards in May 1863, he sold the equity of redemption to McCormack for $7,500. of which $6,500 were paid in hand in confederate currency and a bond for the other $1,000, executed due two years after date. James gave a receipt for the $6,500 paid. Record p 14. McCormack was placed in possession of the land under this purchase.

In 1863, Hansford James filed his petition in Bankruptcy, accompanying which was (as the law required) an inventory of his estate. P 25, marked "schedule B—1."

"(Inventory), interest in hand." In this inventory the Bankrupt recites the deed of trust to Ward, and the sale to McCormack, and the facts relating thereto.

G. J. Holbrook was appointed assignee of Hansford James, and on the 14th September, 1868,sold the said land (as he alleges) at public sale and David E.James the Appellant became the purchaser, McCormack, being at the time in full and undisturbed possession, as the schedule itself disclosed.

McCormack, hearing of the so-called sale and the claim of David E. James under it,filed a bill for the specifice execution of his contract with Hansford James, in which the facts are stated and also asked for and obtained an injunction. (Ps. 11—12) restraining all further proceedings to enforce the alleged purchase by David E. James.

Hansford James the bankrupt answered ps. 12–13–14 and admitted the facts in regard to his sale to McCormack, as set forth by the latter. David E. James also answered ps. 14–15 admitting that McCormack has been in actual, absolute pos-"session, and has exercised ownership since the period named "in the said bill."

G. J. Holbrook the assignee also answered ps. 16–17.

On the 24th of December, 1869, the injunction awarded McCormack was dissolved, and the case remainedwithout further proceedings till November, 1870, and on the fourth day of that month, David E. James and McCormack entered into a written agreement to let James H. Gilmore and A. P. Cole settle all matters between them in regard to said land according to law. P 19.

But in violation of this agreement and without the knowledge of McCormack, the said David E. James, placed the papers in the hands of the District Judge, who, on the 24th of November, 1870 (see decree p 18 and James' answer p 34) adjudged ordered and decreed, that David E. James, the purchaser of the real estate surrendered by said bankrupt and "sold by G. J. Hollbrook, assignee, is entitled to the posses-"sion of said real estate &c., and the Marshal was directed to put him in full possession &c.

This order was executed and thereupon the said McCormack moved to re-instate his injunction and the papers were placed in the hands of the Court to consider that motion and for a hearing, when the Court refused on the 21st of Nov. 1872 to reinstate, but dismissed the bill. P 19

On the 2d of November, 1874, McCormack obtained leave to file his bill of review, and filed the same. Ps. 4–5–6, and afterwards put in an amended and supplemental. Davivd E. James and Hansford James, answered these last named bills

and the cause came on to be heard on the 12th of June, 1875, on the bill of review, the answers of the defendants thereto, the exhibits filed and the papers of the original cause, when the Court reviewed and annulled the decree of Nov. 21, 1872, reinstated the injunction, declared the sale by the assignee Holbrook, to David E. James, void and vacated the same, and ordered that the land be re-delivered to McCormack. P 31.

This decree having been improperly entered on the order book of the circuit court, it was on the 2d of November, 1875, entered in the District Court. Ps. 39–40.

In September, 1875, David E. James filed his petition, complaining of the decree of June 12th, 1875, asking that its execution be restrained and that it be vacated. Ps. 42–34.

McCormack answered this petition, p 45, &c., and on the hearing (ps. 47-8) the restraining order was dissolved and James appealed to the circuit court.

The case being heard in the circuit court, the decrees of 12th June, 1875, and 3d November, 1865, was affirmed, and from this decree David E. James appealed to this court.

From the pleadings and exhibits in the case, these facts clearly appear:

1. That Hansford James parted with the legal title to the land in controversy by his deed of April, 1861, to James Ward, Trustee.

2. That in May, 1863, he sold his equity of redemption to M. McCormack, for $7,500, of which $6,500 were paid in hand in confederate money.

3. That a receipt was given for this payment of $6,500. P 12.

4. That McCormack executed a bond for $1,000, balance of purchase money, due two years after date. (Answer of Hansford James, p 13.)

5. That McCormack, was placed in posession of the land

under his purchase, and held it till evicted by order of the court.

6. That these facts appeared in the Inventory filed by Hansford James as a bankrupt under which Holbrook, the assignee acted and sold the land. P 25.

7. That McCormack's injunction was dissolved November, 1869, and on the 4th of November, 1870, McCormack and James, entered into a written contract to refer the whole matto arbitrators, p 19.

8. That on the 21st of November, 1870, seventeen days thereafter, the papers were placed in the hands of the court (McCormack alleging that he was not notified and knew nothing of this proceeding) and an order obtained to place David E. James, in possession of the land.

From these facts apparent on the record these things necessarily follow.

1. That Hansford James, had no interest whatever in the land when he became a bankrupt, not the legal title, for the deed to James Ward, had divested him of that, not the equity of redemption, for the sale to McCormack took that from him, not the possession, for he had turned that over to McCormack under their contract.

G. J. Holbrook, the assignee and David E. James, the purchaser at the alleged sale must be held to have known this because Holbrook is estopped from saying that he was ignorant of his duties as assignee and of the facts stated on the authority under which he was acting. No court would or should allow him to set up his ignorance of such things.—David E. James the purchaser, must be held in law to know or to have examined the authority of the assignee. So that it is transparent that Holbrook sold and James bought with a legal knowledge of the facts, and knowing that Hansford James had nothing in the land and that the

sale passed no title or even claim. It is impossible for any man to be more completely divested of all claim to land than Hansford James was to this.

An equity of redemption can be sold in Virginia. Hale vs. Horn, 21 Gratton, p 112–121.

McCormack was entitled to specific execution of his contract with Hansford James. Wilde vs. Fox, &c., 1 Randolph 165, Minors Institutes, 2 Ed. vol. 2, p 772-3 et seq. Robinson's Old Practice, vol. 2. p. 172-3. Lester &c., vs. Lester &c., 28, Gratton 737 et seq.

The conduct of David E. James in surreptitiously obtaining a writ of possession within seventeen days after his written agreement to arbitrate the case, was a fraud both on McCormack and the court. Of course, if he had permitted the fact of the reference to have been made known to the court, the Judge would have taken no action pending that proceeding, and there is no aspect of the case, in which James should be allowed to take any benefit from the decree of Nov. 21, 1870.

But if that decree was a valid one, it was not final and was nothing more in effect than executing the order dissolving the injunction, so far as the possession was concerned. It was a motion for a writ of possesion and decided nothing else. The parties themselves did not consider it final, because they united in subsequently submitting the case to be heard and finally decided.

When the proceeding is an injunction there can never be a final decree till the bill is dismissed, because up to that time, the court is always open to hear a motion to reinstate. And as long as the party has that right, he needs no other remedy, and cannot file a bill of review. If he should ask to file a bill of review, before the bill was dismissed, the answer at once would be, that bills of review can only be filed after a final decree and when the party has no other remedy, and

that there is no remedy by motion to reinstate as long as the bill is in court. And in this respect chancery proceedings under an injunction differ from an ordinary suit in equity.

Callan vs. May, 2 Black, 541. Radford vs. James. 1 Hen vs. Mun, p 8. Banks vs. Anderson. 2 Hen and Mun 20.—Ellzey vs. Lane's Exrs. 2 Hen and Mun, 389. Mackey vs. Bell, 2 Munford 523.

The decree of Nov. 21, 1870, cannot possibly be considered a final decree because it did not and could not "end the suit," the case sill being open to move to re-instate.

The decree of November 21st, 1872, was a final decree, because it dismissed the bill of McCormack, and then for the first time, his right to file a bill of review arose, and he filed it within two years, viz. on 4th November, 1874.

There is error of law apparent on the face of the proceedings, as shown by the pleadings and exhibits sufficient to sustain the bill of review and annul the decree of Nov. 21, 1872.

The brief of my associate counsel and the points and authorities made and cited by him are relied on also.

JOHN W. JOHNSTON,
of Counsel for McCormack.

Supreme Court of the United States.

NO. 166.

DAVID E. JAMES, APPELLANT,

vs.

MICAJAH McCORMACK, APPELLEE.

BRIEF OF APPELLEE'S COUNSEL.

DAVID E. JAMES, Appellant.

vs.

MICAJAH McCORMACK, Appellee.

BRIEF OF APPELLEE'S COUNSEL.

On the 25th of April, 1861, Hansford James, of Smyth county, Va., conveyed a parcel of land lying in said county to James Ward in trust, as shown by the deed. Print p. 15.

Hansford James, on the 19th day of May, 1863, sold said land to the Appellee, McCormack, for $7,500, and then and there received $6,500 in cash and Appelle's bond for the unpaid $1,000, and in the fall of that year delivered the possession of the land pursuant to said contract to him. See Appellee's bill Print 5. Appellant's petition, Print 1, and Hansford James' answer, Print 12, 13.

On the 30th day of May, 1868, five years after said sale, and nearly five years ofter he had surrendered possession to Appellee, Hansford James filed his petition for adjudication in bankruptcy in the District Court of the United States for the District of Virginia at Richmond. Print 20.

In his Schedule, Print 25, the said bankrupt, Hansford James, shows that he had conveyed this land, in trust to James Ward, and had afterwards sold "his equitable interest" therein, to the Appellee, and had surrendered to him the possession which he continued to hold.

This schedule, G. J. Holbrook, assignee in bankruptcy of Hansford James, makes a part of his answer. Print 16–17.—Notwithstanding, the bankrupt had thus shown to him by

his schedule, that he had, more than five years prior to his going into bankruptcy, parted with all title to and interest in said land and had placed it in the possession of the Appellee, said assignee proceeded to sell it as the property of the bankrupt Hansford James, see his report at Print. 30, without notice to Appellee.

At the date of these proceedings, the State of Virginia, constituted but one judicial district, the bankrupt lived in Smyth county, the Assignee in Wythe county, the Appellee in Washington county and the Court was held in Richmond, some 300 miles distant. These facts are mentioned to show how it was that Appellee's land was sold without his knowing it.

Immediately upon learning of it, he filed his bill of injunction in the United States Court for the District of Virginia at Richmond. Print 11–12.

Hansford James answered the bill, admitting that he had sold the land; admitting the receipt of the consideration and the delivery of the possession as alleged by Appellee in his bill. Print 12–13.

The Appellant here, David E. James, also answered the bill. Print 14–15.

This answer denies that he knew anything "about the sale of the land *made* by Hansford James to Complainant McCormack," and immediately follows the denial with the admission of Appellee's possession and ownership of it. He further denies that it is "not true *as stated* in said bill that the "said McCormack purchased said land without my notice of

"a lien thereon." Now in point of fact there is no such statement in the bill, and so of other things *denied* in the answer which are not *asserted* in the bill. Appellee by his bill of injunction, was seeking to have the Assignee's sale set aside. He was not controverting, nor was it pertinent to his object, that he should controvert any right which David E. James, the Appellant, might or might not justly claim because of the conveyance of said land *in trust* to Ward. That paper and the rights and liabilities created by it or growing out of it were not mentioned in the bill nor in contemplation when it was prepared. It is respectfully insisted therefore that this answer of Appellant interposed no obstacle to the granting of the relief sought by Appellee's bill of injunction.

G. J. Holbrook, the Assignee in bankruptcy of Hansford James, answers the bill. Print 16–17.

He not only nowhere contradicts the allegation of Appellees bill that he was wholly ignorant of the Assignees sale, but he virtually admits its truth, for he says he never heard "of such a man as the Complainant in said bill until after he "had made sale of the real estate mentioned in the bill."— He exhibits the bankrupt's schedule which shows that the bankrupt had parted with all title legal and equitable, years before to the land, and also shows him that there was then "such a man" as the Appellee, and that he was the owner and possessor of the land.

On the 24th of Nov. 1869, Appellee's injunction was dissolved Afterwards, on the 20th of Nov. 1870, an order was passed authorizing and directing the marshal to put Appellant in possesion of the land. Print 18.

Prior to this, to wit: On the 4th of November, 1870, Ap-

pellant and Appellee, made their agreement in writing, (see exhibit Z. Print 19) submitting their claims to James H. Gilmore and A. P. Cole, or their umpire, and binding themselves in the penalty of $5,000, to abide the decision of said Arbitrators.

Whilst this agreement was binding and operative as between Appellant and Appellee, the order of 21st of November, 1870, without the knowledge of Appellee and without communicating to the court the fact of the existence of the agreement Z. was obtained.

By act of Congress approved the 3d of February, 1871, Virginia was divided into two judicial districts, called the eastern and western districts of Virginia. These proceedings were pending at Richmond in the eastern district, the parties resided in Wythe, Smyth and Washington, in the western district. Hon. Alexander Rives was appointed Judge of the western district, and on the 3d of April, 1872, Print 28, the cause was removed to the western district at Abingdon, as provided by Sec. 6 of said Act.

On the 21st of Nov. 1872, Appellee's bill came on to be finally heard, when it was dismissed. Print 19.

On the 2d of Nov. 1874, Appellee obtained leave and filed his bill of review. Print 4 to 8.

He alleges that he is entitled to relief because of errors apparent on the face of the record and because of after discovered evidence.

On the 12th of June, 1875, the cause came on to be heard upon Appellee's bill of review, the answers of Appellant, of Hansford James, and his Assignee in bankruptcy G. J. Holbrook, general replication of Appellee, the exhibits filed and

"APPELLANT'S 5TH ERROR. There was no proper ground for a bill of review in this case, as no new equity was set up, the latter being but a repetition of the former bill."

5th. There are two grounds set forth in the Bill of Review, either of which would be sufficient to sustain it, viz.: 1st, Error apparent upon the face of the proceedings, and 2d Discovery of new matter. Sto. Eq. Pl. Sec. 405-407.

If Hansford James, the Bankrupt, had parted with the legal title of the land in question to James Ward, Trustee, and had parted with the equitable title to M. McCormack, surely it would be error to hold that he had still another interest in said land which he could convey to his Assignee, and which his Assignee could sell to the prejudice of McCormack—and that too without his knowledge or consent, and without Bill filed for that purpose, and without any other authority whatever. Yet these were the facts apparent upon the face of the proceedings, when the Court rendered the Decrees, which McCormack's Bill of Review sought to correct, and the prayer of which Judge Rives granted. We can hardly conceive a plainer case in which a Bill of Review would lie than this.

And 2d. The new matter, the Appellant and McCormack had entered into an agreement to arbitrate, the matters in difference, between them, and by their agreement had removed the cause beyond the reach of the Court. See agreement Z. Print 19. This was not known to the Court when the Decree dismissing the Bill was obtained, and was properly made known by Bill of Review.

"APPELLANT'S 6TH ERROR. The bankrupt proceedings of

Hansford James, in which there was a sale of the land in controversy to petitioner, sale confirmed, and to which proceedings McCormack was a party, was also conclusive against the said McCormack, and more than two years having expired from the final discharge of Hansford James, as also from the time any cause of action (if any) occured either for or against either assignee or the bankrupt."

6th. We cannot see how the Appellant arives at the fact that McCormack was a party to the proceedings, by virtue of which the sale was made, and is therefore concluded from objecting to it. We deny that there has been any proper proceeding whatever, taken by the assignee, to make the sale. In the first place, he could never sell property that was not the Bankrupt's, and in the second place, granting for the moment that the Bankrupt had an interest in it, (which fact we most emphatically deny,) it being encumbered, it was impossible for him to make sale of it without an order from Court, and there is no pretense that the sale was ever made by order of the Court. Upon the contrary, it was made by the Assignee, upon his own responsibility, without ever invoking the aid of the Court, or convening the parties in interest, and this too, with the schedule of the Bankrupt, plainly indicating to him that the land had been sold to McCormack, and that he, McCormack, was then in possession of it. See Schedule B 1. Print 25.

The Bankrupt had no title to this land, and consequently his discharge cannot effect it one way or the other.

"APPELLANT'S 7TH ERROR. The process issued from, the bill was filed, and proceedings prosecuted in the district court at Abingdon, Va., but the decree of June term, 1875, was entered in the circuit court, without any order of removal there-

to, and the order "nunc pro tunc" at October term, 1875, did not cure the error.

"And 8th Error. If the nunc pro tunc order of October term, 1875, was at all proper, petitioner should have had notice of its application."

7th–8th. The error complained of in these two exceptions, we will answer together. This was a mere clerical error, and one which cannot prejudice any one. The Decree shows upon its face that it was intended to be entered in the District Court, and is signed by the District Judge. The Clerk, thro' mistake, entered it in the wrong place, and when brought to the notice of the Court at the next term, it was corrected by order nunc pro tunc, which simply directs this same decree to be entered in the proper place.

"ON MERITS.

"Appellant's 9th Error. Hansford James having by deed of trust of 31st April, 1861, parted with all his title to the land in controversy, the legal title to the trustee, Ward, and the equitable title to petitioner, David E. James, the cestui que trust, he had nothing to sell to said McCormack at the date of his verbal purchase of said land, on the 19th May, 1863, except his equity of redemption, which had been forfeited by his default in paying the debts secured in the deed of trust, and it was, as it were, foreclosed by his bankruptcy proceedings."

9th. In response to the error assigned in this exception, we will simply ask, how, on earth, did D. E. James, the petitioner acquire the equitable title to this land? Surely not by the deed of trust. If there be anything in this exception, it is, that Hansford James held his land as land never was held before, *i. e.*, he parted with his legal title, to the Trustee;

his equitable title, he bestowed in some way, upon David E. James, and he had still another, which he sold to Micajah McCormack, and still another, which he conveyed to his assignee. Hansford James had the right to sell the land to McCormack after he had conveyed it in trust, McCormack took it subject to the trust. When the trust is discharged a court of equity will compel a conveyance to McCormack.—Code of Va., 1873, ch. 131, sec. 31. Hale vs. Horne 21 Grat. 121-122. Hutchins vs King, 1 Wall, 57-8.

"APPELLANT'S 10TH ERROR. The purchase by said McCormack from Hansford James, the grantor, with a full knowledge of the deed of April, 1861, which was a record in the clerk's office in the county of Smyth, where the lands are situated, was a fraud upon the rights of petitioner.

10th. As to this exception, we have only to say, that if McCormack purchased, while a valid deed of trust was in existence, securing David E. James in any amount, he is, of course bound to pay whatever is due by reason of this lien, unless it be, he, James is estopped by his conduct, at the time McCormack purchased. But this is a matter that cannot be determined here, as it has not been passed on by the court below.

"APPELLANT'S 11TH ERROR. The court erred in ignoring the equities of J. J. M. Wilson, who was a subsequent purchaser of said land from petitioner, for value, without any notice of the latent and stale pretended equities of said McCormack; petitioner being bound to defend both the title and possession of his vendee, Wilson."

11th. It is a sufficient answer to this objection to say, that

the papers of the original cause, when the order of 21 Nov. 1872, was reversed and annulled and the injunction reinstated, the Assignee's sale of the land set aside and a writ of possession awarded to the appellee.

This decree was by mistake of the Clerk entered among the Circuit Court orders at th next term, to wit: 2d November, 1875, it was entered among the District Court orders.

From this decree this appeal was taken.

Both parties claim title through Hansford James.

The Appellant James contends that he is the owner of said land by sale of said Assignee made in 1868.

The Appellee McCormack contends that he is the owner of it by reason of his purchase of it from Hansford James in 1863.

The Appellee does not controvert anything arising out of the deed of trust executed in 1861 by Hansford James to James Ward.

The Petition for an appeal assigns twelve errors, in the proceedings of the District Court, for which the Decrees complained of should be reversed. We will endeavor to notice, and reply to them in their regular order:

The first assignment of error by Appellant is:

"APPELLANT'S 1ST ERROR. The United States district court at Abingdon, on the bill of review, had no jurisdiction of either the persons or subject matter of this controversy, and hence said decrees of June and October, 1875, are "coram non judice," and must be reversed and annulled."

1st. We would ask in response to the error here assigned, "If the District Court at Abingdon on the Bill of Review had no jurisdiction," what court had? and where would you

proceed to review the decisions of that court? Revised Statutes of U. S. Sec. 4979.

It is not a little strange that the Appellant claims the land in controversy, by virtue of the Decrees, of the District court and insists that that court had jurisdiction to pass those decrees, and then again insists, that the court which thus vested him with title, has no power to review its decrees, though there may be all the reasons for doing so, which usually control courts, in the exercise of that jurisdiction.

"APPELLANT'S 2D ERROR. The decrees of 24th November, 1869, and 24th June, 1870, of Hon. John C. Underwood, at Richmond, being final between same parties, and as to same subject matter, and unappealed from, were "res adjudicata," and hence not to be impeached by a court of co-ordinate jurisdiction, presided over by a different judge, as was the district court at Abingdon."

2d. As regards the error here assigned, we have only to say that so far as this case is concerned, the District Court at Richmond and the District Court at Abingdon are one and the same. The case was properly pending in Richmond when the Court at Abingdon was established, and it was then pursuant to law removed. Judge Underwood could have reviewed these Decrees, and so could his successor, Judge Rives.

"AXPELLANT'S 3D ERROR. Under statute of limitations it was quite too late for the bill of review of 1st January, 1875, to review the decrees of November, 1869, and June, 1870, at Richmond."

3d. Statute of Limitations only runs against a *Final* De-

cree, and not against an interlocutory Decree.

Hendricks vs. Fields 26, Gratt. 452.

Bill of Review is not received to an interlocutory decree. Banks vs. Anderson 2, H. & M. 20.

It ought only to be received when the Decree sought to be reviewed and reversed is final, and the parties out of Court and if it be received before such final decree, it should be dismissed at the costs of the party filing it.

Ellsey vs. Lane 2 H. M. 589. McKey vs. Bell 2, Munf, 523 Sto Eq. Pl. pp 404-5-6

An Order dissolving an injunction is not a final decree.—Pitts vs. Tidwell 3, Munf. 90.

Decree of Nov. 1869, dissolves injunction. Print p 18.

Decree of Nov. 1870 authorizes a writ of possession. Print p 18.

Decree of Nov. 1872, brings cause on to be finally heard, and dismisses the bill at pltfs. cost. Print p 19.

McCormack had no right to file his Bill of Review, until after this Decree of Nov. 1872, and he filed it in October 1874, in less than two years after the final decree.

Again the decree of 21 Nov. '70, was properly regarded by both the District and Circuit Courts as interposing no obstacle to the relief sought by Appellee.

1. Because it appeared by the answer of the Appellant that when that decree was passed he and the Appellee had by their written agreement--exhibit L. print 18—chosen their own judges and referred the matters in litigation between them to those judges, to whose decision they bound themselves in the penalty of $5,000, to stand; All of which was then unknown to the Court.

2. Because the decree of 21st of Nov. 1870 was obtained without the knowledge or consent of Appellee and whilst the agreement to arbitrate was operative and obligatory up-

on the parties to it.

The statute of limitations can't be relied on because it has not been pleaded, Sullivan vs. Portland and Kennebec, R. R. Co., 94 U. S. Rep. 807-811. Rules of Court No. 31, p 138, 1 Abb. U. S Practice.

Hickman vs. Stout, 2 Leigh, 10.

Hudson vs. Hudsons Admr. 6 Manf. 356.

It is not relied on in the answer, Sullivan vs. Portland and Kennebec R. R. Co , 94 U. S. Rep. 807-811. The Appellant Rec. 10 in his answer says:

"This respondent would further show unto your honor, "that in his view of the case that the decree sought to—re-"viewed in this case is the one of date Nov. 1869, dissolving "said injunction, that the bill in this suit filed by Complain-"ant to review said decree was not filed in the time required "by the statute of limitations, and upon this statute to defeat "the review sought by Complainant, this respondent relies as "if the same was *since* formally pleaded." We deny that this can be regarded within Rules of Court, No. 31, above cited. But if it be, then it plainly appears that the plea is confined to the decree of 24th of Nov. December it should be—1869, Rec. 18.

This decree is merely interlocutory and not final.

"APPELLANT'S 4TH ERROR. After refusal of Judge Rives to reinstate appellee McCormack's original bill, no new bill of review could be filed in the same court, the motion to reinstate and decree threin of November, 1872, being itself a review."

4th. We hardly think the Counsel can be in earnest, when they say a motion to reinstate is a Bill of Review, and we will therefore not further notice this Assignment of Error.

Wilson is not complaing, though Appellant seems anxious that he should do so. He is in no manner before the Court, and of course cannot be effected by this proceeding.

Mutual Benefit Ins. Co. vs. Tridale, 91, U. S. 244. It don't appear by the record that he was a purchaser. If a purchaser at all he was a *pundente lite* purchaser.

"APPELLENT'S 12TH ERROR. The court erred in the extent of relief granted said McCormack; all the relief he was entitled to (if any) being the re-payment to him by Hansford James alone of the scaled value of the trashy, depreciated $6,500 in Confederate States treasury notes paid by him in his own wrong to said Hansford James for land that he knew the said Hansford James had conveyed to petitioner's trustee more than two years before the said verbal contract of the 23d May, 1863: For these and other errors, to be urged at bar, petitioner pays for an appeal and superseades to said decrees of June and October, 1875, of the court below and that the same be reviewed, reversed, and annulled.

12th. The substance of this objection is, that Hansford James having parted with his legal title, had no right to dispose of his equity of redemption, and that because he did presume to sell it and receive Confederate money for it, the man who paid him Confederate money in performance of his contract, and that too, at the instance of his would-be guardian, the Appellant ought to lose the land he purchased unless an insolvent vendor can pay him. But even this modicum of justice here conceded is denied by the decree of the court below which the Appellants asks this court to affirm and make effective. See decrees page 18. We do not think this position need be further answered.

The Appellant insists, throughout his petition & pleadings,

that McCormack's purchase was a mere verbal one and therefore void. He seems to loose sight of two writings, either of which would be sufficient to take it out of the operation of the Statute of Frauds, viz.: The receipt given by Hansford James to McCormack, for the $6,500 purchase money, and the note for $1,000, executed by McCormack for the balance of the purchase money, both of which papers show upon their face that they are for land, and it is admitted that they represent this transaction. As to their sufficiency—see 1 Sugden on Vendors, 7 Am. Ed. page 115, (Marginal,) Sec. 8.

Cole vs. Trecothick 9, Vesey, p. 234; Blagden vs. Bradbear, 12 Vesey, 466.

But if there were no memorandum in writing—the agreement is admited by the answer.

1 Sug. on Vend., Same Ed., p. 115 (Marg.) sec. 10.

And again the possession was surrendered to McCormack in pursuance of the contract, and he held it quietly until, this proceeding was commenced, and is thereby entitled to specifice performance of his contract.

Lester vs. Foxcroft, 1 L. C. E. p 732-3.

Heth's Exor. vs. Wooldridge 6, Rand 606-7.

Parrill vs. McKinley 9, Gratt. 1.

Antony vs. Leftwich 3, Rand. 255.

The Decree of the District Court, p 39, should be affirmed.

JOHN A. CAMPBELL, Counsel
for M. McCormack.